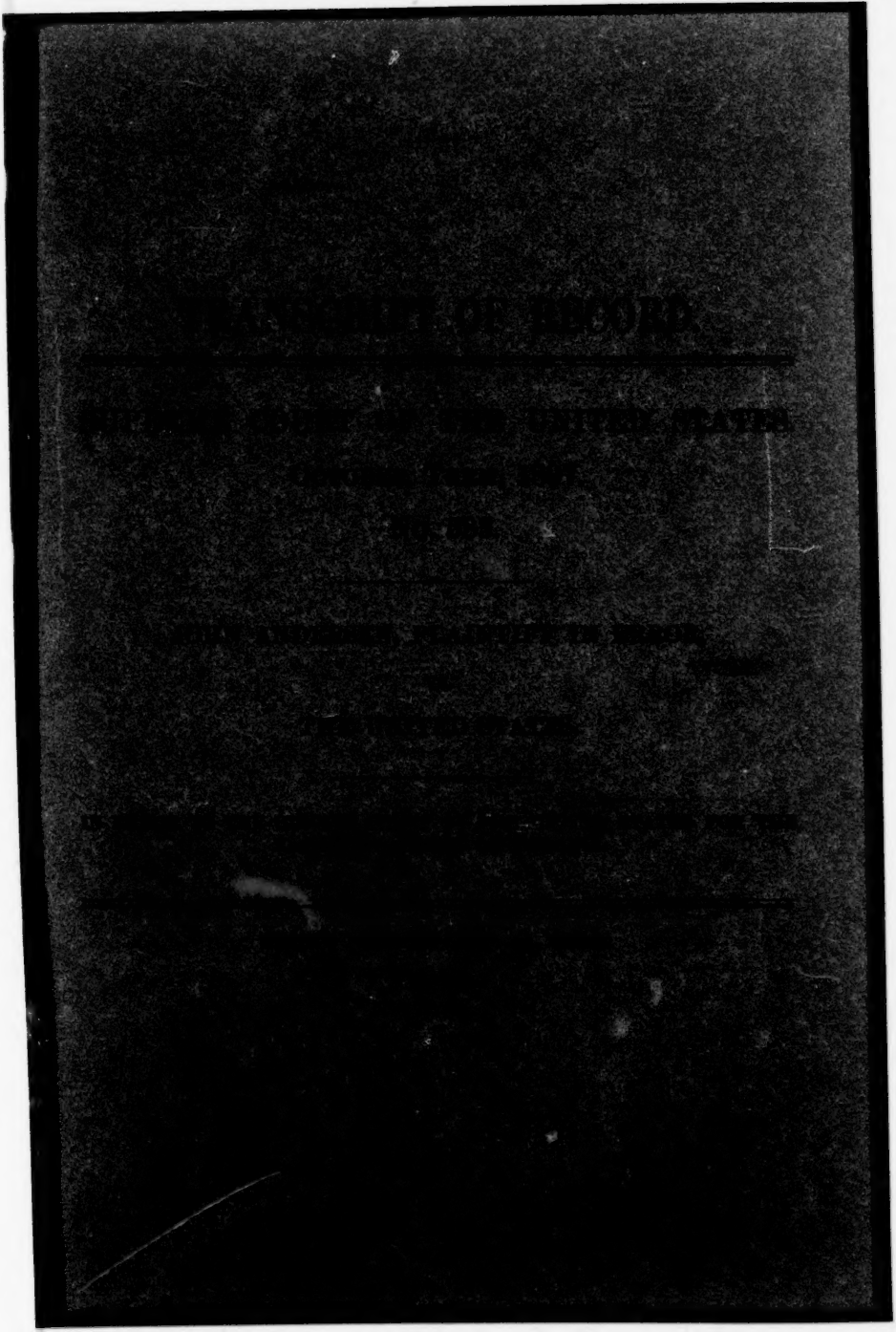

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 583.

JOHN ANDERSEN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

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1 TRANSCRIPT OF RECORD.

Order assigning Geo. McIntosh, esq., counsel to defend defendant.

THE UNITED STATES,
vs.
JOHN ANDERSEN, ALIAS JOHN ANDERSON.

The court having on the 8th day of November, 1897, upon its own motion, as well as upon the request of the accused, John Anderson, assigned George McIntosh, esq., as counsel for the said John Anderson, under and by notice of Sec. 1034, Revised Statutes of the United States, and it appearing to the court that he has since then performed the duties of such counsel and has been recognized as such by this court in all proceedings had herein.

And it further appearing that no entry of such assignment was made in the minutes of this court for the said 8th day of November, A. D. 1897, it is hereby ordered that the said assignment be now entered by the clerk of this court as of the said 8th day of November, A. D. 1897.

Dec. 14, 1897.

RO. W. HUGHES, *Judge.*

Indictment.

United States of America, in the circuit court of the United States in and for the eastern district of Virginia, at the November term
2 thereof, in the year of our Lord one thousand eight hundred and ninety-seven.

The grand jurors of the United States of America within and for the eastern district of Virginia, in the fourth judicial circuit, upon their oath present: That John Andersen, alias John Anderson, mariner, late of the State of Massachusetts, in the United States of America, heretofore, to wit: On the sixth day of August, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, on the high seas and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a schooner called and named "Olive Pecker," then and there belonging to a citizen or citizens of the said United States of America whose name or names is or are to the grand jurors aforesaid unknown, in and upon one William Wallace Saunders, sometimes called William Saunders, then and there being on board said vessel, did piratically, wilfully, feloniously, and of his malice aforethought make an assault, and that the said John Andersen, alias John Anderson, a certain pistol then and there charged with gunpowder and leaden bullets, which said pistol he, the said John Andersen, alias John Anderson, in his
3 hand (but which hand is to the said jurors unknown) then and there had and held, then and there piratically, feloniously, wilfully, and of his malice aforethought did discharge and shoot off to, against, and upon the said William Wallace Saunders, sometimes called William Saunders, with intent him, the said William Wallace Saunders, sometimes

called William Saunders, then and there to kill and murder, and that the said John Andersen, alias John Anderson, with the leaden bullets aforesaid out of the pistol by the said John Andersen, alias John Anderson, discharged and shot off as aforesaid, then, to wit: On the said sixth day of August, in the year of our Lord one thousand eight hundred and ninety-seven, and there, to wit: On the high seas as aforesaid, in and on board of the said American vessel, and within the admiralty and maritime jurisdiction of the said United States of America and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the United States of America, piratically, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound the said William Wallace Saunders, sometimes called William Saunders, in and upon the head of him, the said William Wallace Saunders, sometimes called William Saunders (and in and upon other parts of the body of him, the said William Wallace Saunders, sometimes called William Saunders, to the said jurors unknown), giving to him, the said William Wallace Saunders, sometimes called William Saunders, then and
4 there, with the leaden bullets aforesaid, so as aforesaid discharged and shot off out of the pistol aforesaid by the said John Andersen, alias John Anderson, with the intent aforesaid, in and upon the head of him, the said William Wallace Saunders, sometimes called William Saunders (and in and upon other parts of the body of him, the said William Wallace Saunders, sometimes called William Saunders, to the said jurors unknown), several grievous, dangerous, and mortal wounds, and the said John Andersen, alias John Anderson, did then and there, to wit: At the time and place last above mentioned, him, the said William Wallace Saunders, sometimes called William Saunders, piratically, feloniously, wilfully, and of his malice aforethought cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown him, the said William Wallace Saunders, sometimes called William Saunders, in the sea aforesaid, of which said mortal wounds, casting, throwing, plunging, sinking, and drowning the said William Wallace Saunders, sometimes called William Saunders, in and upon the high seas aforesaid, out of the jurisdiction of any particular State of the United States of America, then and there instantly died.

And the grand jurors aforesaid, upon their oath aforesaid, do say that by reason of the casting and throwing of the said William Wallace Saunders, sometimes called William Saunders, in the sea as aforesaid, they can not describe the said mortal wounds with greater particularity.

5 And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said John Andersen, alias John Anderson, him, the said William Wallace Saunders, sometimes called William Saunders, at the time and place aforesaid, upon the high seas as aforesaid, and out of the jurisdiction of any particular State of the United States of America, in and upon the said American vessel, within the jurisdiction of the United States of America and of the admiralty and maritime jurisdiction of the said United States of America and of this court, in the manner and form aforesaid, piratically, wilfully, feloniously, and with malice aforethought did kill and murder, against the peace and dignity of the United States of America and contrary to the form of the statute of the United States of America in such case made and provided.

And the grand jurors aforesaid, upon their oath aforesaid, do further find and present that the eastern district of Virginia, in the United States of America, in the district into which the said John Andersen, alias John Anderson, was first brought after committing said offence.

WM. H. WHITE,
United States Attorney.

A true bill.
W. W. DEY, *Foreman of Grand Jury.*

Witnesses: Martin Barstad, Andrew March, A. J. Hall.

6 (Endorsed:) #241. U. S. circuit court, eastern district of Virginia. The United States vs. John Andersen, alias John Anderson. Indictment for murder of William Wallace Saunders, sometimes called William Saunders. Filed Dec. 18th, 1897. M. F. Pleasants, clerk.

Minutes of trial.

At a stated term, to wit, the November term, A. D. 1897, of the circuit court of the United States of America, of the fourth judicial circuit, in and for the eastern district of Virginia, held at the court room in the city and county of Norfolk, on Saturday, the 18th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Nathan Goff, circuit judge.

Present: The Honorable Ro. W. Hughes, district judge.

THE UNITED STATES OF AMERICA *vs.* JOHN ANDERSEN, ALIAS JOHN ANDERSON. } No. 241. Indictment for murder committed on the high seas, &c.

7 The prisoner, in person and by his counsel, Geo. McIntosh, esq., admitted service of copies of the indictment against John Andersen, alias John Anderson, for the murder of William Wallace Saunders, sometimes called William Saunders, and numbered 241, and also of the list of jurors and witnesses for the United States, and waived any further compliance with the provisions of section 1033 of the Revised Statutes of the United States, and announced his readiness to proceed with his trial on the said indictment, numbered 241.

Thereupon the said accused demurred to the said indictment on the ground that it does not specify the locality on the high seas where the alleged offense occurred, and for other reasons not assigned. Thereupon the United States joined in said demurrer as to the said cause so assigned and objected to the said demurrer being in any wise considered, for reasons not assigned.

Whereupon, after argument, the court overruled the said demurrer for the cause assigned as aforesaid and admonished the accused that he must state any other grounds of demurrer on which he relied, as the court could not otherwise consider them. No other grounds being alleged by the accused, the said demurrer was overruled. Thereupon the accused, John Andersen, alias John Anderson, was led to the bar of the court in the custody of the marshal and duly and formally arraigned, and upon his arraignment pleaded "not guilty" to the said indictment No. 241.

Thereupon the petit jurors heretofore summoned to attend upon
8 this court were called and each one examined on his oath touching his qualifications to serve in this case, and from challenges and otherwise, a sufficient number of jurors not being obtained, it was ordered that the marshal of this district or his deputy return forthwith jurymen from the bystanders sufficient to complete the panel.

Thereupon, the jurors so returned by the said marshal, being each examined upon his oath as to his qualifications to serve as a juror in this case, a panel of thirty-seven jurors were found duly qualified and free from exception. Whereupon the prisoner struck from said panel twenty of the said jurors, and the United States, by its attorney, struck therefrom five others, leaving twelve of the said jurors duly qualified to serve, to wit: B. F. Rosson, J. G. Simmons, H. C. McFarland, S. S. Kelly, B. O. Williamson, C. B. Oliver, George K. Langdon, John Wentz, C. P. Fitchett, H. F. Jordan, J. C. Shadbolt, and W. L. Newton. The said jury were thereupon duly sworn and the said indictment numbered 241 read to them by the clerk.

The prisoner, by counsel, here interposed an objection that the clerk had not charged the jury as to the different grades of homicide, which objection the court overruled for the reason that the clerk had not charged the jury as to the law, but had simply read the indictment against the accused to the jury in the presence of the accused and presented
9 him to the jury, to which ruling of the court the accused, by counsel, excepted, which exception is here noted.

Thereupon, on motion of the accused, it is ordered that the further hearing of this cause be adjourned to Monday morning, December twentieth, at ten o'clock. The jury were admonished by the court not to confer with any one concerning the case, and the said jury was duly committed to the United States marshal and his several deputies and bailiffs as follows, viz: Thomas H. Cross, Chas. J. Creekmur, and Frank G. Story, jr., upon each of them severally taking the following oath:

"You swear that you will keep this jury in some convenient place until the time to which this court shall be adjourned, during each and every adjournment of this court pending this case, and that you will not suffer any person to speak to them, nor speak to them yourself, unless by order of the court, or to ask them if they are agreed, and that you will not suffer them to disperse until you shall return them into court again, so help you God." The accused was remanded to the custody of the marshal. The court stands adjourned to Monday morning, December twentieth, 1897, at ten o'clock.

10 *Minutes of trial.*

At a stated term, to wit, the November term, A. D. 1897, of the circuit court of the United States of America, of the fourth judicial circuit, in and for the eastern district of Virginia, held at the court room in the city and county of Norfolk, on Monday, the twentieth day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Nathan Goff, circuit judge.

Present: The Honorable Ro. W. Hughes, district judge.

THE UNITED STATES OF AMERICA
vs.
JOHN ANDERSEN, ALIAS JOHN ANDERSON. } No. 241. Indictment for murder committed on the high seas, &c.

This day came again the jury pursuant to their adjournment from Saturday, December 18th, 1897, and the accused, John Andersen, alias John Anderson, was led to the bar in the custody of the marshal. Thereupon William H. White, United States attorney, made the opening statement for the Government, and Geo. McIntosh, counsel for the accused, made the statement of his defence for the accused. C. L. Marsilliot was then sworn as stenographer to correctly transcribe the evidence adduced for the Government and the defence at the trial.

11 Thereupon A. J. Hall, of Rockland, Maine; Thomas J. Newton, of Washington, D. C.; Robert C. McGeouch, of Boston, Massachusetts; John Taylor, Thomas H. Cross, and Martin Barstad were, after being duly sworn, examined as witnesses for the United States. At 1 p. m. the court took a recess of an hour. The accused was remanded to the custody of the marshal, and the jury were placed in charge of Thos. H. Cross, Chas. J. Creekmur, and F. G. Story, jr., deputy marshals and bailiffs of this court, who first took the usual oath to keep the jury together, and to prevent communication with them by anyone.

At two o'clock p. m. the court reconvened, the prisoner and all the others named above being present. H. H. Little, esq., was sworn as an additional stenographer to correctly take down and transcribe the statements of all witnesses examined in this case. John Lind, Andrew March, Juan de Dios Barrial were thereupon duly sworn and examined as witnesses for the Government. William Horsburgh was then sworn and his examination as a witness for the Government commenced, and having completed his examination in chief, the court, at 5.40 o'clock, adjourned until Tuesday, Dec. 21st, at 10 a. m. The prisoner was remanded to the custody of the marshal, and the jury were placed in charge of Thomas H. Cross, Charles J. Creekmur, and F. G. Story, jr., after the usual oath had been taken by them to keep the jury together and to prevent them from communicating with anyone, the said Thomas H. Cross,

12 Charles J. Creekmur, and F. G. Story, jr., being deputy marshal and bailiffs, respectively, of this court.

Minutes of trial.

At a stated term, to wit, the November term, A. D. 1897, of the circuit court of the United States of America, of the fourth judicial circuit, in and for the eastern district of Virginia, held at the court room in the city and county of Norfolk, on Tuesday, the 21st day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Nathan Goff, circuit judge.

Present: The Honorable Ro. W. Hughes, district judge.

THE UNITED STATES OF AMERICA
vs.
JOHN ANDERSEN, ALIAS JOHN ANDERSON. } No. 241. Indictment for murder committed on the high seas, &c.

This day came again the jury, pursuant to their adjournment from Monday, December 20, 1897, and the accused, John Andersen, alias John

Anderson, was led to the bar in the custody of the marshal. William Horsburgh, the witness who was under examination when the court adjourned Monday, completed his testimony. Juan de Dios Barrial, Martin Barstad, and A. J. Hall were then recalled, and after being further examined the Government rested. Thereupon the defendant,
13 by his counsel, moved the court to instruct the jury to bring in a verdict of not guilty, which motion the court overruled, to which ruling of the court the defendant, by his counsel, excepted. The accused, John Andersen, alias John Anderson, was then sworn and examined in his own behalf.

At one p. m. the court took a recess of an hour. The accused was remanded to the custody of the marshal and the jury were placed in charge of Thomas H. Cross and Frank G. Story, jr., deputy marshal and bailiff, respectively, of this court, who first took the usual oath to keep the jury together and to prevent communication by them with anyone.

At two o'clock p. m. the court reconvened, the prisoner and all the others named above being present. The defendant resumed the witness stand and completed his testimony. Walter Small, John Asberg, and John Darnhart were then sworn and examined as witnesses for the defence. Counsel for the defendant then rested. Thereupon Wm. Horsburgh, John Lind, Juan de Dios Barrial, Andrew March, John J. McCarthy, Peter C. Eldridge, G. G. Mariner, and John C. Williams were called and testified in rebuttal for the Government. The district attorney then stated that this completed the evidence of the Government. The court then adjourned until Wednesday, Dec. 22nd, 1897, at ten a. m.

14 The prisoner was remanded to the custody of the marshal, and the jury were placed in charge of Thomas H. Cross and Frank G. Story, jr., deputy marshal and bailiff, respectively, of this court, they having first taken the usual oath to keep the jury together and to prevent communication by them with anyone.

Minutes of trial.

At a stated term, to wit, the November term, A. D. 1897, of the circuit court of the United States of America of the fourth judicial circuit in and for the eastern district of Virginia, held at the court room in the city and county of Norfolk on Wednesday, the 22nd day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Nathan Goff, circuit judge.

Present: The Honorable Ro. W. Hughes, district judge.

THE UNITED STATES OF AMERICA	No. 241. Indictment for
vs.	murder committed on
JOHN ANDERSEN, ALIAS JOHN ANDERSON.	the high seas, &c.

This day came again the jury pursuant to their adjournment from Tuesday, December 21, 1897, and the accused, John Andersen, alias John Anderson, was led to the bar in the custody of the marshal. Thereupon Geo. McIntosh, esq., counsel for John Andersen, alias John

Anderson, asked the court to grant certain instructions to the
15 jury, numbered, respectively, 1, 2, 3, 4, 5, 6, & 7, and marked "Defendant's Instructions," and Wm. H. White, attorney for the United States, asked the court to grant certain instructions on behalf of the United States, marked "Instructions for the United States." At one p. m. the court took a recess of an hour. The accused was remanded to the custody of the marshal, and the jury were placed in charge of Thomas H. Cross and Frank G. Story, jr., deputy marshal and bailiff, respectively, of this court, who first took the usual oath to keep the jury together and to prevent communication by them with anyone.

At two o'clock p. m. the court reconvened, the prisoner and all the others named above being present. Whereupon the court heard argument on the said instructions, and rejected those asked for by the defendant and the United States except in so far as the same were embodied in a general charge of the court to the jury, which charge the court proceeded to give to the jury. The court then adjourned until Thursday, December 23rd, 1897, at ten a. m. The prisoner was remanded to the custody of the marshal and the jury were placed in charge of Thomas H. Cross, T. D. Coghill, and Frank G. Story, jr., deputy marshals and bailiff, respectively, of this court, they having first taken the usual oath to keep the jury together and to prevent communication by them with
onyone.

16 *Minutes of trial.*

At a stated term, to wit, the November term, A. D. 1897, of the circuit court of the United States of America, of the fourth judicial circuit, in and for the eastern district of Virginia, held at the court room in the city and county of Norfolk, on Thursday, December 23rd, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable Nathan Goff, circuit judge.

Present: The Honorable Ro. W. Hughes, district judge.

THE UNITED STATES OF AMERICA	No. 241. Indictment for murder committed on the high seas, &c.
vs.	
JOHN ANDERSEN, ALIAS JOHN ANDERSON.	

This day came again the jury pursuant to their adjournment from Wednesday, December 22, 1897, and the accused, John Andersen, alias John Anderson, was led to the bar in the custody of the marshal.

Thereupon the jury, having heard all the evidence and arguments of counsel, retired to consider of their verdict, and after some time returned into court and in the presence of the prisoner returned their verdict in the following language: "We the jury find the defendant, John Andersen, alias John Anderson, guilty of murder as charged in the indictment. B. F. Rosson, foreman."

And thereupon the prisoner, by his counsel, moved the court to
17 set aside the said verdict and grant him a new trial, which motion was argued by counsel, and on consideration, the court being fully advised, the same was overruled by the court, and the accused by counsel excepted.

Whereupon the prisoner through his counsel moved the court to arrest the judgment against the said accused for the same reasons alleged in his

motion for a new trial, which motion being argued by the counsel was overruled by the court and the prisoner by his counsel excepted.

And the prisoner being present, was led to the bar in the custody of the marshal of this district, and it being asked of him if anything for himself he had or knew to say why this court should not now proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay of judgment, it is considered by the court that the said John Andersen, alias John Anderson, be taken hence by the marshal of this district and confined in close custody in the Norfolk jail until Friday, the eighteenth day of March, 1898, and that he then be taken by the United States marshal in and for the eastern district of Virginia, to some suitable place in the said district, and between the hours of two and six in the afternoon of that day that he be hanged by the neck until he shall be dead.

The marshal will take the prisoner, and the district attorney will see that the sentence is carried out. And thereupon the said John
18 Andersen, alias John Anderson, is remanded to the custody of the marshal of this district, to be confined in the city jail of Norfolk, Virginia, as above provided.

19 In the circuit court of the United States for the eastern district of Virginia. November, 1897. Session at Norfolk, Virginia.

THE UNITED STATES)
vs.) Indictment No. 241.
JOHN ANDERSEN, ALIAS, &C.)

Before Circuit Judge Nathan Goff and District Judge Ro. W. Hughes.

Bill of exceptions of defendant.

Be it remembered that the American three-masted schooner "Olive Pecker" sailed from Boston, Massachusetts, on the 20th day of June, 1897, for Buenos Ayres, South America, with a cargo of lumber under and
20 on deck. She had on board a captain, J. W. Whitman; a mate, William Wallace Saunders, sometimes called William Saunders; an engineer of a donkey engine, William Horsburgh; a cook, viz, the defendant, John Andersen, and four seamen, viz, Martin Barstad, a native of Norway; John Lind, a native of Sweden; Juan de Dios Barrial, a native of Spain, and Andrew March, a native of Newfoundland; that the said "Olive Pecker" was an American vessel, belonging to citizens of the United States; that the said vessel proceeded from Boston on her course to her port of destination until the morning of August 6th, 1897, when, on the high seas and about 100 or 150 miles off the Brazilian coast, between nine and ten o'clock on that morning, the captain, Whitman, was shot in his cabin, and shortly thereafter the mate was shot on the left-hand side of the forecastle head and his body immediately thrown into the sea. The body of the captain was also thrown into the sea. Several hours thereafter the said vessel "Olive Pecker" was burned, and the cook, engineer, and four seamen took to the sea in an open boat. Twenty-eight or thirty hours thereafter they reached the Brazilian coast, where, having spent the night on shore, they separated

the next morning, the accused and John Lind going in a northerly direction and the other four going in a southerly direction. That the
21 accused and Lind, within a few days, reached Bahia, in Brazil. Both shipped, the accused on a vessel called the "Bernadotte," bound for Pensacola, in the United States, and Lind on a Brazilian barkentine, bound for some point in Spain. The other four men, having the Spaniard as their spokesman, he being familiar with the language of the country, and not finding an American consul, made known to the Brazilian authorities what had transpired on the "Olive Pecker," with the request that telegrams be sent along the coast for the arrest of the accused, John Andersen. These four men, having secured passes on a vessel to Bahia, arrived there several days after the arrest of the accused, and were placed in charge of the American consul at that port. The accused handed to the American consul a statement in his own handwriting, purporting to be an account of the voyage of the "Olive Pecker," and also made to the American consul a sworn statement, as did also the other five men, which said statements were duly transmitted to the Department of State at Washington, and upon the call of defendant's counsel were produced for his use at the trial, but were not produced in evidence.

At the direction of the Government at Washington, the American consul at Bahia kept the accused and the five men in custody at Bahia until the arrival at that port some time in the month of September, 1897, of the United States man-of-war "Lancaster," when they were
22 put on board of that vessel and brought into Hampton Roads, Virginia, in the eastern district of Virginia, that being the first district into which the accused was brought after the commission of the alleged offense; and the said accused, together with the five men, was turned over by the officers of the "Lancaster" to the United States marshal on the 7th day of November, 1897, and were duly placed in confinement in the city jail at Norfolk, Virginia.

The accused, having waived examination before the United States commissioner, was, in due course, indicted in the circuit court of the United States for the eastern district of Virginia for the murder of said William Wallace Saunders, sometimes called William Saunders, on the said 6th day of August, 1897, upon the high seas, within the admiralty and maritime jurisdiction of the United States of America, and out of the jurisdiction of any particular State thereof, and within the jurisdiction of this court, in and on board of the said American vessel called the "Olive Pecker." The said indictment was in the words and figures following:

United States of America, in the circuit court of the United States in and for the eastern district of Virginia, at the November term
23 thereof, in the year of our Lord one thousand eight hundred and ninety-seven.

The grand jurors of the United States of America within and for the eastern district of Virginia, in the fourth judicial circuit, upon their oath present: That John Andersen, alias John Anderson, mariner, late of the State of Massachusetts, in the United States of America, heretofore, to wit, on the sixth day of August, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, on

the high seas and within the jurisdiction of this court and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a schooner, called and named "Olive Pecker," then and there belonging to a citizen, or citizens, of the said United States of America, whose name, or names, is or are to the grand jurors aforesaid unknown, in and upon one William Wallace Saunders, sometimes called William Saunders, then and there being on board said vessel, did piratically, wilfully, feloniously, and of his malice aforethought make an assault: and that the said John Andersen, alias John Anderson, a certain pistol, then and there charged with gunpowder and leaden
24 bullets, which said pistol he, the said John Andersen, alias John Anderson, in his hand (but which hand is to the said jurors unknown) then and there had and held; then and there piratically, feloniously, wilfully, and of his malice aforethought did discharge and shoot off to, against, and upon the said William Wallace Saunders, sometimes called William Saunders, with intent him, the said William Wallace Saunders, sometimes called William Saunders, then and there to kill and murder; and that the said John Andersen, alias John Anderson, with the leaden bullets aforesaid out of the pistol by the said John Andersen, alias John Anderson, discharged and shot off as aforesaid, then, to wit, on the said sixth day of August, in the year of our Lord one thousand eight hundred and ninety-seven, and there, to wit, on the high seas as aforesaid, in and on board of the said American vessel, and within the admiralty and maritime jurisdiction of the said United States of America, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the United States of America, piratically, feloniously, wilfully, and of his malice aforethought did strike, penetrate, and wound the said William Wallace Saunders, sometimes called William Saunders, in and upon the head of him, the said William Wallace Saunders, sometimes called William Saunders (and in and upon
25 other parts of the body of him, the said William Wallace Saunders, sometimes called William Saunders, to the said jurors unknown), giving to him, the said William Wallace Saunders, sometimes called William Saunders, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot off out of the pistol aforesaid by the said John Andersen, alias John Anderson, with the intent aforesaid, in and upon the head of him, the said William Wallace Saunders, sometimes called William Saunders (and in and upon other parts of the body of him, the said William Wallace Saunders, sometimes called William Saunders, to the said jurors unknown), several grievous, dangerous, and mortal wounds; and the said John Andersen, alias John Anderson, did then and there, to wit, at the time and place last above mentioned, him, the said William Wallace Saunders, sometimes called William Saunders, piratically, feloniously, wilfully, and of his malice aforethought, cast and throw from and out of the said vessel into the sea and plunge, sink, and drown him, the said William Wallace Saunders, sometimes called William Saunders, in the sea aforesaid, of which said mortal wounds, casting, throwing, plunging, sinking, and drowning the said William Wallace Saunders, sometimes called William Saunders, in and

upon the high seas aforesaid, out of the jurisdiction of any
26 particular State of the United States of America, then and there instantly died.

And the grand jurors aforesaid, upon their oath aforesaid, do say that by reason of the casting and throwing of the said William Wallace Saunders, sometimes called William Saunders, in the sea as aforesaid they can not describe the said mortal wounds with greater particularity.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that the said John Andersen, alias John Anderson, him, the said William Wallace Saunders, sometimes called William Saunders, at the time and place aforesaid, upon the high seas as aforesaid, and out of the jurisdiction of any particular State of the United States of America, in and upon the said American vessel, within the jurisdiction of the United States of America and of the admiralty and maritime jurisdiction of the said United States of America and of this court, in the manner and form aforesaid, piratically, wilfully, feloniously, and with malice aforethought, did kill and murder, against the peace and dignity of the United States of America and contrary to the form of the statute of the United States of America in such case made and provided.

And the grand jurors aforesaid, upon their oath aforesaid, do further find and present that the eastern district of Virginia, in the
27 United States of America, is the district into which the said John Andersen, alias John Anderson, was first brought after committing said offense.

WM. H. WHITE,
United States Attorney.

A true bill.
W. W. DEY, *Foreman of Grand Jury.*

Whereupon, on the 18th day of December, 1897, the accused being present in court in person and by his counsel, George McIntosh, esq., admitted service of a copy of the said indictment against him for the murder of William Wallace Saunders, sometimes called William Saunders, numbered two hundred and forty-one, and also of a list of the jurors and witnesses for the United States, and waived further compliance with the provisions of section 1033, Revised Statutes of the United States, and announced his readiness to proceed with his trial on the said indictment numbered two hundred and forty-one. Thereupon the said accused demurred to the said indictment on the ground that it did not specify the locality on the high seas where the alleged offense occurred, and for other reasons not assigned. Thereupon the United States joined in said demurrer as to the said cause so assigned and objected to the same being in any wise considered for any reasons not assigned
28 by the accused. Thereupon, after argument, the court overruled the said demurrer upon the cause assigned as aforesaid, and admonished the accused that he must state any other grounds of demurrer on which he relied, as the court could not otherwise consider them. No other grounds being alleged by the accused, the said demurrer was thereupon overruled. Thereupon the accused, John Andersen, alias John Anderson, was led to the bar of the court in the custody of the marshal and duly and formally arraigned, and upon his arraignment

pleaded not guilty to the said indictment numbered two hundred and forty-one. Whereupon the prisoner, by his counsel, moved to quash the writ of venire facias for the petit jury to be used in the trial of this particular case, on the ground that the said writ must show that said venire were summoned for the trial of this particular case, and not the general venire for offenses in general to be tried at this term of the circuit court of the United States for the eastern district of Virginia. On consideration whereof the court overruled the said motion, to which action of the court the defendant, by his counsel, excepted. The writs for the venire above referred to are in the words and figures following, to wit:

29 *Subpœna.*

UNITED STATES OF AMERICA, *Eastern District of Virginia, ss:*

The United States of America to the marshal of the eastern district of Virginia, greeting:

We command you to summon Geo. K. Langdon, L. L. Maury, L. M. West, Earnest Goodrich, John Wentz, Moses J. Eaton, jr., Geo. M. Whitehurst, John E. Whitehead, Chas. B. Goodwin, Rufus L. Barnes, Lasalle Jackson, Geo. M. Bonney, John E. Whitehurst, W. Y. James, I. A. Hewitt, M. W. Kellam, Edward R. Hanell, Carr D. Butler, W. A. West, Reginald Wright, Curtin A. Shoop, Robert Jordon, Edwin C. Ramsey, Jason Holland, R. L. Woodward, Thos. J. Miles, James Twiford, D. Darden, F. de Bordenave, Frank M. Jones, R. H. Rawles, R. E. Whitehead, Warren Wamsley, T. B. Rowland, B. F. Rosson, W. E. Harding, J. M. Shepherd, W. F. Dusch, J. G. Simmons, Robt. Fletcher, Oscar Griffin, John C. James, Geo. Phillip, H. C. McFarland, Geo. W. Consolvo, C. B. Oliver, Daniel Wilson, B. O. Williamson, S. S. Kelley, W. M. Womble, if they shall be found in your district, to be and appear before our judges of our circuit court of the United States for the said district of Virginia, at the fall term thereof, to be holden at Norfolk, in the district aforesaid, on the 15th day of December, 1897, to serve as petit jurors of said court at said term.

And this they in no wise to omit, under penalty of the law in that case made and provided. And have you then and there this writ.

Witness the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Richmond, in said district, this
30 6th day of December, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the 122nd.

[SEAL.] M. F. PLEASANTS, *Clerk.*

Subpœna.

UNITED STATES OF AMERICA, *Eastern District of Virginia, ss.*

The United States of America to the marshal of the eastern district of Virginia, greeting:

We command you to summon, in pursuance of an order of the circuit court of the United States this day entered, to be taken from the bystanders, twelve persons to complete the petit jury ordered by the said court

on the 18th day of December, 1897, if they shall be found in your district, to be and appear before our judges of our circuit court of the United States for the said district of Virginia for the November, 1897, term thereof, to be holden at Norfolk, Virginia, in the district aforesaid,

31 forthwith to serve as petit jurors aforesaid.

And this you shall in no wise omit, under penalty of the law in that case made and provided. And have you then and there this writ.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Norfolk aforesaid, this 18th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

[SEAL.] M. F. PLEASANTS, *Clerk.*
By H. S. ACKISS, *Deputy Clerk.*

and are here made a part of this bill of exceptions.

Thereupon a jury was duly sworn and empanelled to try the case, as appears from the minutes of said court for Saturday, December 18th, 1897; and the prosecution and defense having made their opening statements to the jury, the Government submitted the following testimony, the uncontroverted facts narrated in the foregoing bill of exceptions not being repeated in the testimony, and the formal parts of the testimony of witnesses being also omitted for the sake of brevity. It is understood that all the witnesses for the Government wer' sworn before giving in their testimony, and this statement is made to avoid the necessity of repeating it as to each witness.

32 THOMAS JOHN NEWTON, a clerk in the State Department at Washington, identified the original statements made by the accused and the crew of the vessel "Olive Pecker" to the American consul at Bahia, in Brazil, and delivered the same into the custody of the court, which statements the court announced were at the service of the accused, but which were not introduced as testimony.

A. J. HALL, of Rockland, Maine, testified that he knew the "Olive Pecker;" had contracted for her and had her built. She was an American vessel and was a three-masted schooner; that he had sailed her as master about seven years, and that she was built in 1889. He was familiar with her structure and dimensions. He was here shown a large oil painting of the said schooner, which he had painted himself, which said painting is left in the custody of the court. He also introduced diagrams, marked Nos. 1, 2, 3, and 4, of the vessel's decks, cabins, and profile, which said diagrams are made a part of the record. After explaining the said diagram, he proceeded to state that the apartments in the after cabin were used by the captain, mate, steward, etc., as indicated

33 by the names written on said diagrams, and explained that the wheelhouse was in the after part of the vessel and furnished with windows so as to permit the man at the wheel to see forward. He also stated that the "Olive Pecker" carried a donkey engine for hoisting her sails and anchor. Thereupon, the following questions were asked of and answered by him:

By Mr. WHITE, United States attorney:

Q. Captain, standing here and looking from this window (in the wheelhouse) out upon the deck of the "Olive Pecker," will you say whether

a man standing in the wheelhouse in the after part of the vessel has an unobstructed view of the top of the forward house and of a man standing on the head of the forecastle; looking from the windows in the wheelhouse, can he see forward here on top of this house?

A. O', yes; straight along, if the sails is on the starboard side. Now them sails [indicating the painting] are on the port side.

Q. Captain, assuming that the sails are swinging to the right or starboard side of that vessel, could a man, with the sails swinging on the right side of the vessel, the man standing in the wheelhouse, have
34 an unobstructed view along the left side of the vessel to the forecastle head?

A. If the boom is on the starboard side of the vessel and she is on the port tack, a man can see right straight forward.

Q. Then there is nothing to obstruct his view forward?

A. Not a thing.

Q. Is it true or not that the wheelhouse is so built as to give a man at the wheel a view forward in order that he may see how to steer the vessel?

A. Yes, sir.

Mr. McIntosh. If your honors please, I don't want to interpose any hypercritical objections in this trial, but he is examining the witness on a suppositious case, and I object to the question in that form. The witness has not testified as to any knowledge of the condition of affairs when this casualty is alleged to have occurred.

Mr. White. If your honors please, having given the conditions, I asked whether, assuming those conditions to exist, assuming that those sails were swinging to the right, or starboard side in marine parlance, whether a man standing in the wheelhouse could see along the left side of the vessel.

35 Judge Goff. He built the vessel and sailed her for seven years. He is being examined as a man who is perfectly familiar with the general situation of the vessel, and unless the testimony hereafter shows its pertinency, it will amount to nothing.

Q. Captain, with a deck load of sawed lumber so distributed as to reach nearly level with the top of the after cabin here and with the forward cabin, it would have the effect, would it not, to practically raise the deck of the vessel as much higher than the actual deck as the height of the pile of lumber would be, would it not?

A. You mean whether when she has a deck load on the main deck six feet high or seven feet high, whether a man can see forward from the wheelhouse?

Q. No; I mean to ask you whether, when she is loaded with a deck load of lumber about the same height as the top of the houses on deck, it does not make an artificial deck on her?

A. Yes, sir; it makes an artificial deck all over the vessel.

Q. Then the men moving about the deck of the vessel would move around on top of the lumber on deck?

A. Yes, sir.

36 Q. Is it customary in loading vessels with a deck load of lumber to leave passageways or stairways to go down in different parts of the vessel?

A. We most always do that when we can, when the lumber comes right, but sometimes we have to go right over it when we can't.

Q. Are you or not familiar with the deck load of the "Olive Pecker" when she sailed from Boston on the 20th of June?

A. No, I don't know anything about that.

Counsel for accused moves to strike out all testimony as to the condition of the vessel at the time of the casualty.

Mr. WHITE. I have asked him nothing about that. He is simply describing the deck in view of his familiarity with the vessel and what can be seen from one portion of it to the other, and whether or not, if lumber was upon it, whether a view could be had over it.

Mr. MCINTOSH. And it is on that very point that I wish to make the objection, claiming that a hypothetical question put to a witness in a criminal trial is improper unless it is proved that the hypothesis exists in point of fact. I take it that there is no better rule of evidence known to the criminal law. Mr. White, after putting these hypothetical

37 questions as to the deck load and the condition of affairs under a certain state of hypothesis, finally winds up by asking if he knows anything about the deck load in this particular case. He is not acquainted with the condition of the vessel, and I say, therefore, that all previous statements made by him as to her condition are entirely improper.

Judge GOFF. If I understood it, he has testified as to the condition of the deck——

Mr. MCINTOSH (interrupting). As loaded at the time of the alleged occurrence.

Judge GOFF. The court does not understand that he has so testified. Anything that would bear that construction, as a matter of course, will be excluded from the jury. I think it is eminently proper that the jury should understand the character of this vessel. This man is familiar with it; he built it, he has commanded it. He is detailing to the jury nothing that took place at the time of the alleged offence. He is giving the general character and situation of the vessel so that you may understand it, which I think is eminently proper. As he was not on the vessel at the time of this occurrence, the court will not permit him to testify about anything that took place then.

To which ruling of the court the prisoner excepted.

38 Cross-examined by Mr. MCINTOSH:

Q. Do you know the condition of her load?

A. No, sir; I do not.

Q. Do you know the condition of her boats, and where they were?

A. No, sir.

Q. Do you know anything about her condition at all?

A. No, sir; I don't know nothing about her.

Q. I understand you to say that you don't know anything about the deck load, the condition of it, and your illustrations made before the jury were purely on the hypothesis the district attorney stated?

A. I understood that what I stated about her deck load was the way I generally put them. I know nothing about this deck load at all.

Q. That's what I thought.

The register of the vessel was introduced by the Government, and the fact of her being an American vessel, owned by American citizens, is conceded.

39 ROBERT MCGEOUCH.

I am superintendent of stevedores at Boston, Massachusetts, and superintended the loading of the American schooner "Olive Pecker" in Boston Harbor, in June of the present year. She was loaded with sawed lumber, a part of which she carried on deck. The diagram number four handed me is correct as showing a side view of the vessel, with her deck load of lumber, the parallel lines thereon indicating the lumber. The lumber was piled on her deck in the neighborhood of seven feet high. It was not piled above the roof of the aftercabin, but on a level with the roof of the afterhouse of the vessel, or about four to six inches above the roof of the said cabin. It was not piled above the skylights of the said cabin. It was also piled about from four to six inches above the roof of the forward house of the vessel. As the deck load stood when I left her, it was not so piled as to prevent a man standing in the wheelhouse from seeing to the top of the forward house and to the forecastle head. I do not know when she sailed. I finished loading her on the 11th of June, 1897. The lumber was not piled on the deck in any manner to close up any of the windows or doors of the cabins. Breaks were made in the deck load so that the openings could be reached in the cabins.

40 JOHN TAYLOR, master-at-arms in the United States Navy, identified the accused as the same who was taken on board the "Lancaster" at Bahia, in September last, and the same who was delivered to the United States authorities at Norfolk, in Virginia, and who stated that the eastern district of Virginia was the first district in the United States into which the accused was brought after leaving Bahia, which fact, however, is not controverted by the defense.

THOMAS H. CROSS, deputy marshal for the eastern district of Virginia, testified that he received the accused, John Andersen, from the United States authorities on the seventh of November, 1897, and that he has been in his custody as such marshal ever since.

MARTIN BARSTAD. I am a Norwegian. I shipped at Boston, Massachusetts, on the 16th of June, 1897, on board the American schooner "Olive Pecker," bound for Buenos Ayres, loaded with sawed white pine lumber.

I recognize the painting shown me as that of the said vessel.

I last saw William Saunders, the mate of the said vessel, alive on the morning of August the 6th, 1897, on the left side of the forecastle
41 head of that vessel. It was between nine and ten o'clock of that morning. He was shot at that time and place by John Andersen, the cook of the vessel and the prisoner here. I saw him shoot him. I was at the wheel of the vessel, in the wheelhouse, just aft of the aftercabin.

I heard a report of a shot in the captain's cabin, which was connected with the wheelhouse by the after companionway. Immediately after I saw John Andersen, the accused, come running up the after companionway and through the wheelhouse, with a pistol in each hand and one in his hip pocket. He ran up to John Lind, who was standing amidships by

the rigging of the middle mast. He said something to Lind, but I did not hear what it was. I heard him sing out to the mate, Saunders, who was up on the cross-tree of the foremast, at work in the rigging, and say, "Come down, Mr. Saunders." The mate said, "What do you want, steward?" In a little while the mate finished the job and started down the rigging. When about midway down, and when the cook, Andersen, was standing on top of the forward house, the mate started down and said, "What you got in your hands, cook?" "I got guns," he says. "Where you get them?" says the mate; "Down in the cabin," he says.

42 The mate came down and stepped on the forecastle head, not on the forecastle house. Then Andersen fired a shot. The mate reeled and faced him, and said, "For God's sake, don't shoot me, cook." The cook fired another shot, and the mate kept on reeling; and the cook fired another one, and a third one, when the mate fell, and he shot him once after he had fallen. Then the cook sung out to the men, who were in the forecastle, "I am in charge of this vessel; I am next to the mate." He sung out again, "Won't you fellows come out?" They came out and I saw them throw the mate's body overboard. I was at the wheel all the time. Then he marched the whole gang aft and went down in the cabin and brought the captain up and threw him overboard. He then said, "If any man like, he can put me in irons." He had two or three pistols, one in his hand then. He had said he was in charge of the vessel and had ordered the men to throw the mate and captain overboard. I was at the wheel all the time. Then he says, "Boys, come down and have a drink." He went down in the captain's cabin and handed a bottle of whiskey, about two parts full. He gave each a drink and took one himself. Then he marched the whole gang up on deck, just outside the door of the wheelhouse, and said, "You know all you men is guilty for helping me throw the bodies over the side."

43 The Spaniard told him to keep the vessel off, to clew up the gaff topsails and jibs, the outer jib, and make for port. The cook said, "Damn; you want me to get hung." We said, "No, steward, we don't want you to get hung." All the time he was armed. After a little he said to the Spaniard, "You the only sensible man amongst the crowd; I want to speak to you." Then he called John Lind afterwards and spoke to him. I don't know what he said. He ordered the men to do so and so. I left the wheel and went to the forecastle. The rest of the men came forward to get their clothes. He ordered us to get our best clothes, and no more; he said take no discharges, bank-books, nothing. He ordered the men down in the booby hatch to get up a barrel addressed to the American consul at Buenos Ayres. Then he told me to go down in the galley to tap some paraffine oil. I said "No." He says, "You go," and handed his pistol in my face. "All right," I says, "steward." I filled three buckets and passed them up, and Andrew March took it and threw it on the deck-load. He was standing there armed all the time. Then he, the cook, ordered me to take the wheel. I went. The first fire commenced at the booby hatch; the next was forward. The boat was lowered and provisions put in it. We then got in the boat; I was the last man to get in. Then we hoisted sail in the boat, and as we started the cook fired three shots, saying,

"That is man-of-war style." He got the cartridges he loaded
44 his pistols with out of the captain's drawer. I saw him pull the drawer out. He took a whole package and put some loose ones in his pocket. Then I told John Lind this shooting was not done yet. The schooner was burning a long time after we left her. I could see the glare late in the night. We saw a steamer's lights coming towards us about dark the evening we left the "Olive Pecker." The Spaniard was at the tiller. The steamer looked like it was coming down on us. The cook took the tiller from the Spaniard and nearly upset the boat. He says, "If they come down and pick us up I will pop them." It was twelve or one o'clock when we left the "Olive Pecker." No vessels were in sight which could have picked up the bodies of the mate and captain. On the way to the shore in the sailboat the cook told us if we were picked up by any vessel we would tell that the captain and mate went down in the booby hatch to try to put a fire out, and the mate came up on fire and jumped overboard, and the captain stayed down and never came up no more. We landed about eight or nine o'clock of the evening of the day after we left the "Olive Pecker," at some point on the Brazilian shore. We made a tent of the boat sail and spent the night there. The next morning we drew lots to see who should go together, having decided to go in twos. Me and Andrew March drew
45 for partners, and Horsburgh and the Spaniard, and John Andersen and John Lind. When we parted the cook fired three shots. It made us step quick. John Anderson and John Lind went in a northerly direction and the rest of us in a southerly direction. We four walked till we got to a small village and asked for an American consul. The Spaniard did the talking; he could speak the language—the Portuguese language. We got a night's lodging there. The next morning the Spaniard went to the head of the police. The Spaniard was told that a steamer was coming in that day, bound for Bahia. The police authorities got passage for us on to Bahia. We went on to Porto Seguro and there gave statements to the Brazilian authorities. The captain of the steamer, at the request of the Spaniard, telegraphed on to Bahia to arrest John Andersen and John Lind. When we got to Bahia Andersen and Lind were in jail. We went to the American consul there and made our statements. Then we were kept there by the consul till transferred to the American ship "Lancaster" and brought him to Hampton Roads, Virginia.

By a JUROR:

Q. In pointing at the vessel just now you stated that the deck load was about here [height of the first hoop below the boom on mizzen mast].

46 A. The deck load comes up about on a level with the top of the cabin, just on a level with the cabin, sir; right fore and aft.

Q. It came up about on a level with the top of the cabin?

A. Yes, sir; about on a level.

I was standing in the wheelhouse when John Andersen came out of the cabin just after I heard the shot in the cabin. The sails were swinging to the starboard, or right hand. He ran down the left-hand side of the vessel to where John Lind was standing amidships, working on a

mat; then he walked on down till he got to the top of the forward house and sung out the first time, "Mr. Saunders, come down." He sung out a second time, "Mr. Saunders, come down." The mate asked him, "What do you want, steward?" He finished his job and hung the marlin spike around his neck and came down the rigging. The marlin spike had a half hitch on the point, which put the point upwards. That is the way sailors do it to keep the point from striking them as they go up and down the rigging.

There was nothing to keep me from seeing the mate in the rigging and when he came down, and all along the vessel on her port side to where the shooting occurred. The sails were all swinging to starboard.

The lumber was so piled on the deck that a man running along
47 on it would run right on top of the forward house. John Andersen was standing on top of the forward house when he shot the mate, and the mate was standing on the forecastle deck The forecastle deck is about three feet lower than the top of the house where the cook was standing. The body of the mate was lying, when picked up, on the forecastle head, on the left side of the vessel.

By a JUROR:

Q. Where were you standing when he ordered you to go down below?
A. Right here [indicating position of after figure in painting].
Q. Which way did you go to get down there?
A. That is the hatch right down there [indicating on painting].
Q. Where was the oil?
A. In the galley, the cook's house.
Q. Where was the barrel laying?
A. In the galley. That run into the bucket.
Q. When he ordered you to do that, that was after the bodies were thrown overboard?
A. Yes, sir.

Q. How many windows are there in the wheelhouse?
48 A. Three windows in front and one aft, sir.

By Mr. WHITE:

Q. Did the cook keep himself armed and did he order you to burn the vessel?
A. Yes, sir.
Q. Or did you burn her because you were afraid if you did not——
A. (Interrupting.) He said "I will make every s—n of a b—h as guilty as myself."
Q. So that nobody would give himself up?
A. So nobody would give himself up; that's the word he said.
Q. You made a statement, you say, to the American consul at Bahia, in Brazil?
A. Yes, sir.
Q. And you signed that statement, did you not?
A. Yes, sir.
Q. Did you, or not, in that statement, simply make answers to such questions as were asked you?
A. Yes, sir.

49 Cross-examination by Mr. McIntosh:

Everything is the truth in the statement I made at Bahia. If it was my own father, I wouldn't make make no alteration; it was the same as I stated here. When the shooting happened I was in the wheelhouse at the window. John Andersen was standing on the forward house, about a hundred and fifty feet away. I am sure I could see all in between those points. There were four able seamen there aboard the "Olive Pecker." I mean to tell the jury that five of us were intimidated by that one man, the cook—the cook with the pistols. He intimidated us so that when he ordered us to burn the ship we obeyed. He was following us up all the time. He ordered one to go there, and another to go there, and another one there. We had to follow the man at the point of the pistol or else get killed. We did what we were told to do through his pistol. When I went down to get the oil he says, "You go down, you s—n of a b—h." All this time the men were doing just as if they had a pistol held up to them. While he couldn't hold the pistol over each man all the time, one man was working here and another there. They were not all together all the time. I saw him, the cook, when they threw the mate overboard. John Andersen,
50 John Lind, Juan Barrial, Wm. Horsburgh, and Andrew March threw the mate overboard. He made the five men throw him overboard. They obeyed his orders because they were afraid of him. I was the last man got in the sailboat. I don't know when Andersen got in. The Spaniard, Barrial, was the first man to get in the boat. Andersen made him get in and lower the boat. The boat was hanging astern of the "Olive Pecker" and was not on top the after house in front of the windows of the wheelhouse. There was a little boat lying between the two skylights [indicating on the painting]. That little boat was not up so I could not see forward where the cook stood, anyhow; I was a hundred and fifty feet away.

When the cook killed the mate, the latter came down out of the rigging and said something to the cook. He asked him "What have you got in your hands, steward?" The steward said, "I got guns." The mate came down, stepped on the forecastle head, and John Andersen fired a shot. The marlin spike was not in the mate's hand, but was hanging around his neck, with the point up. I am sure of that, though I was a hundred and fifty feet away. I did not have a glass. The mate was standing with his hands at his side, with the marlin spike around his neck. He did not make any hostile demonstration towards the
51 cook. He did not come at him to strike him. I am positive of that. I do not know the mate had threatened the cook's life.

I did not get drunk while going ashore in the sailboat, though I had drunk the whiskey John Andersen gave me. I did not get drunk before the "Olive Pecker" was set on fire. I did not go down in the cabin and break open the storeroom and get the liquor. I did not go in there and pull all the captain's things out. I did not get drunk. John Andersen did not have his pistols in his hands in the sailboat all the time, but he had them in his pocket. When we saw the ship's lights the evening we left the "Olive Pecker," we did not try to overpower the cook and give ourselves up to the ship. None of us liked to go

against him then. I think he was a better man then with his guns than all five of us. He had one hand on the tiller. He could have steered and had a pistol in the other hand. The breeze was light. He intimidated all five of us into doing what we did. All the men aboard the "Olive Pecker" were able-bodied men. It made no difference that the cook was no bigger than the others, he had plenty of guns. It is correct the cook shot the mate and the men threw him overboard by his orders. I can't tell if he was dead when they threw him overboard. I did not hear him give the order to throw the mate overboard.

52 I saw it. I know he ordered the men to come out, because he said, "I am in charge of this ship. I am next to the mate. Won't you boys come out? Won't you boys come out? You boys come out and throw him overboard." I didn't hear him give orders to throw the mate overboard. The rest of the men told me he did. I heard him order them to throw the captain overboard. I said I saw him order the men out of the forecastle and throw the mate overboard. I do not mean to say I heard him tell the men to throw the mate overboard.

Redirect examination:

There was only about two-thirds of a bottle of whiskey. Five of us drank that. Horsburgh, the engineer, did not drink, only the cook and the other four of us. I saw the men come out of the forecastle when the cook ordered them out, saying he was in charge of the ship, and saw him, with the men, throw the mate overboard. I saw the accused march the men aft after the mate was thrown over and take them down into the cabin, and heard him give orders to throw the captain's body overboard, and heard him afterwards ordering all to be done that was done. No other members of the crew had any pistols. Andersen was the only one who was armed.

53 By a JUROR:

Q. Don't all you sailors carry a rigging knife, sticking in behind here?

A. Yes, sir; a sheath knife.

Q. Did you all have them?

A. I had one, sir.

By ANOTHER JUROR:

Q. You say John Andersen helped to throw the mate overboard. Did he catch hold of him himself?

A. Yes, sir; he did.

Q. What did he do with his guns when he had them?

A. He had them on all the time.

Q. All of you had a hand in throwing the mate overboard?

A. I didn't.

Q. But he did himself?

A. Yes, sir.

JOHN LIND.

My name is John Lind and I am a native and citizen of

54 Sweden. I enlisted on board the American vessel "Olive Pecker," in Boston, last June. She was a three-masted schooner;

the painting here shown me correctly represents her; I had never sailed on the "Olive Pecker" before. I recognize John Andersen, the accused, as the man who was cook on the "Olive Pecker;" she had other able-bodied seamen, Martin Barstad, Andrew March, Juan Barrial, and myself. She sailed from Boston on the 20th of June, loaded with white pine sawed lumber. I last saw Mate William Saunders on the 6th of August of this year; he was killed that morning by John Andersen on the forecastle head, on the left or port side thereof. I saw Andersen just before the shooting of the mate that morning, coming up from the cabin through the after companionway and through the wheelhouse; I was standing amidships; he came up with a revolver in each hand; he came right up to me and asked me where the mate was, and said, "I have killed the captain, and now the mate goes too." The mate was then aloft, in the rigging of the foremast. I went then down on the lee or starboard side of the vessel to the forecastle house; I went and called the watch below in the forecastle house. I said, "You better look out because the cook is on deck with revolvers." As I was calling through the window I could not see on the left of the vessel. While I was call-
55 ing to the men I heard a shot on the port side, on the forecastle head. I heard three or four shots, I don't exactly know how many. I heard the steward call to the men to come out, for all of them to come up there. He was calling the men in the forecastle house. He said he wanted us to throw the body overboard. When I came up, all hands were there except the man at the wheel, Martin Barstad. The mate was lying on the forecastle head with his face downward. He had a marlin spike tied around his neck. A marlin spike is used for splicing ropes, an instrument that all sailors carry aloft when they go up to splice a rope; it is carried around the neck by a long lanyard and a half hitch on the point to keep it from sticking in his legs. We threw the body overboard. Then the cook told us to come aft and get the captain's body overboard. We went in the after cabin and found the captain sitting in his chair; sitting like this, sir, with his hands folded in his lap. He looked as if he was alive. I saw blood on the side of his head, on the left side. We were told to take him up by Andersen; he helped. He was taken up and thrown overboard. Andersen was armed all this time. Before throwing the captain's body overboard, Andersen took hold of the captain's arm and felt his pulse. When the body was thrown overboard, Andersen cursed it. The captain's body was sitting in a chair in
56 the after cabin, near the sofa on the starboard side of the cabin. He was facing forward. I had only been in the cabin once before, when we were in Boston. On American vessels seamen do not go in the captain's cabin unless they are sent or called there. There are doors opening from the forward cabin into the after cabin and from the mate's room into these cabins.

After the captain's body was thrown overboard, Andersen told us to go down and he would give us a drink. We went down in the cabin, in the forward cabin where the dining room table was, and got a drink. I don't recollect whether Andersen drank with us or not. There was not much liquor in the bottle, a little over half a bottle I think, not enough to make anyone drunk. I didn't see anyone drunk. After taking a drink, we went up on deck and talked about making the small sails

fast. The Spaniard and myself suggested that the small sails be made fast and to make for land. This was not done. Andersen said, "No, keep her up to her course,"—she was off a little. "Keep her up to her course," he said; "you want me to be hanged?" He then said to the Spaniard, "You are about the sensiblest man; I want to speak to you." I did not hear what he said to him. He then called me. I went to the lee side of the wheelhouse and he asked me what I thought was best to do with
57 the vessel. I said, "The only thing we can do now is to try to make for some land." He said, "No, nothing is going to be done but to destroy the vessel." He did not say anything more to me after that. If he spoke to any of the rest, I didn't see or hear it. He then ordered everything to make ready for to leave the ship. The old boat sail was all tore up and I started to patch that. I was engaged about it about an hour I should think. He then gave orders to lower the boat. Me and the Spaniard lowered the boat. It was the big boat you see hanging at the stern in the picture. Me and the Spaniard did lower the boat and Andrew March went down and unhooked the tackle, and we hauled the boat up alongside the vessel and got some provisions down there. Then the cook called Andrew and he went up. After I was through with that I went up on the house again and I saw flames coming out of the after hatch. She was afire then. Then they all went down in the boat and all hands cut the boat adrift, rigged up the mast, and started to sail. The cook helped us to rig up the mast and sail. He was armed all that time with pistols. I do not think any other members of the crew had pistols. I did not see any of them have pistols. When we left the ship Andersen fired some shots. I do not recollect what he said when he fired them. There was a dog taken along in the boat.
58 I do not know whose dog it was, but it was the only one that was on the "Olive Pecker." The Spaniard was at the tiller when we left the burning vessel. We could see the light from the burning vessel the whole night. There were no vessels sighted after the bodies of the captain and mate were thrown overboard which could possibly have picked up the bodies. The bodies were dead, in my judgment, when they were thrown overboard. We saw a steamboat that night, about eight o'clock in the evening. It was after dark. Andersen took hold of the tiller and steered off to keep away from the steamboat. He said, when he did that, "If they come and pick us up, I will pop them," or something like that. The next day we were told by Andersen to say, if we were picked up, that the vessel caught on fire and the captain and mate went down in the poop to see how it was, or something like that; that the mate came up in flames and jumped overboard and the captain never came up any more. We were in the open boat about thirty hours after leaving the vessel before reaching land. We reached land the evening of the day after we left the vessel, about dark. We made tents of the boat sail and spent the night on the shore. The next morning we drew lots to see who should go partners. It fell to my lot to go with John Andersen,
59 the cook. John Andersen and I started off together. The first place we went to was a small village, but we never stopped. The first place we stopped was Belmont. At Belmont, John Andersen sold the captain's watch. I do not know if it was the captain's watch; he sold a watch. He sold a watch; I don't know whether it was the captain's

watch or his. The dog went along with us. He got sick the first day and John Andersen shot him. Afterwards we met a gentleman and he promised to give us passage to Bahia on a schooner. He did so, and we came to Bahia. John Andersen shipped on a Norwegian ship, called the "Bernadotte," bound for Pensacola, in the United States. I shipped the next day aboard a Brazilian brigentine. I was arrested the same day and John Andersen was also arrested and we were taken up to prison. A couple of days after that the other men came there, and then we was up to give our statements to the consul in Bahia. Then we were sent to prison, waiting for the man-of-war to come and take us. The "Lancaster" did come, and we were all put aboard of her at Bahia ans first landed in the United States here in Norfolk. We were turned over to the United States marshal and have been imprisoned here ever since.

(For cross-examination, see next page.)

60 Cross-examination by Mr. McIntosh:

Q. Then when you were put in the hospital here at the city jail, you and Barrial and Barsted and March were all together, were you not?

A. No, sir.

Q. Aren't you together now in the jail?

A. They put us there last night.

Q. You were last night?

A. Yes, sir.

Q. Haven't you and Barsted and some of these men been together in the jail? Who was your cell mate in the jail?

A. With the Spaniard a couple of days.

Q. Now got another?

A. No, sir; I was along with Martin Barsted for a few days and then we went over to the hospital and they put me and the Spaniard and William Horsburgh——

Q. And then they put the balance of the three of you together?

A. Yes, sir.

Q. That was in the jail?

A. Yes, sir.

Q. Then you were under indictment for burning this ship?

A. I don't know what indicted for—I didn't know nothing——

Q. Don't you know the fact that you and the Spaniard and Horsburgh, the engineer, were all under indictment for burning
61 this ship?

Mr. White. From what time?

Mr. McIntosh. Say from November 18th. You say you don't know?

A. I never heard any indictment myself.

Q. Don't you know the fact that you were under indictment for the burning of the ship?

A. I suspected it, but I never had any indictment read up to us.

Q. Don't you know the fact?

A. When we came ashore here?

Q. And afterwards the indictment was dismissed as to you and these other three men? (To the court): He knows it, and I want to show he knows it. (To the witness): Don't you know it?

A. When we landed here? Of course we were indicted.

62 Q. You made a statement before the consul at Bahia, didn't you.

A. Yes, sir.

Q. Have you told everything you told to the consul at Bahia?

A. Everything I remember, sir.

Q. You say the first time you saw that mate that morning was when he was forward in the rigging?

A. That's the last time I saw him.

Q. Now tell me the first time you saw him and what happened then?

A. The first time I saw him, I came on deck at eight o'clock and saw him then and he gave me a mat to go to work at; that's the first time I saw him.

Q. Now the next time you saw him?

A. When I saw him again he was swinging in the mizzen topsail, me and the mate, and after that I went forward and carried the topsail halyard and came forward walking on the deck load and heard Ander-

63 son come out and ask the mate why he didn't protect him.

Q. Why didn't you tell that?

Mr. WHITE. For the simple reason it is not pertinent. It is not competent testimony. I didn't bring it out, because it is not competent testimony. We are dealing with the murder of the mate.

Mr. MCINTOSH. And showed the murder of the captain, or are undertaking to show it.

Mr. WHITE. No, I have shown the res gestae. I do not object to its coming out except that the point is very nearly reached when your honors will be called upon to decide what testimony is admissible as to antecedent occurrences. He is going to show that the man claimed protection from the mate against the captain, which has nothing to do with this case, but I am not raising the point distinctly now. The gentleman is going on to ask why he did not testify to this before. I simply ask counsel that, as he knows I desire to raise that point, he will propound his question in such way that the court will be able to pass upon the objection.

Mr. MCINTOSH:

Q. State what occurred between this man and the mate just before the alleged killing you were talking about?

A. Anderson asked him, "Wont you protect me until we get to port?" He says, "Get to port! You will get killed anyhow," or something like that—sounded like that to me as I was passing along the deck load.

64 Q. Along the deck load?

A. Yes, sir; the mate was down at the hatch.

Q. What were the circumstances under which Anderson asked the mate to protect him? Had he just come from the captain?

A. No, sir, the captain had been down in the galley.

Q. How came he to ask the mate to protect him?

A. The captain was cussing and treating him badly.

The District Attorney here objected on the ground that this man was on trial for the killing of the mate, and that counsel had no right to go into any altercation between the prisoner and the captain; to which counsel for the accused replied that the Governmant had gone into the

killing of the captain and the burning of the vessel and claimed that they were part of the res gestae, and that he had a right to inquire into what had passed between the accused and the captain.

The Court asked what time elapsed between the conversation of the accused and the mate and the killing of the mate, and the District Attorney asked the witness:

Q. What length of time passed between the time when you say you heard the cook ask the mate for protection and the killing of the captain, if you know when the captain was killed?

A. Yes, I heard a shot, sir.

Q. What time did you hear the shot which you think killed the captain?

A. This was about half past nine, I think.

65 Q. What time was it you heard the cook claim the protection of the mate from the captain?

A. Between eight and nine.

Q. About an hour apart, then?

A. Yes, sir, I think about that.

Q. And before the captain was shot?

A. Yes, sir.

The COURT. Gentlemen, we will dispose of these matters as we reach them. For the present the question is permitted as a conversation that took place in the hearing of the witness between the accused and the mate. I think that so far as that question is concerned the witness may give it to the jury.

Mr. MCINTOSH:

Q. You heard this conversation, then, between the mate and this man, in which Anderson called for the protection of the mate?

A. Yes, sir.

Q. And you heard the mate tell him what?

A. Say, "Go to hell—you will get killed anyhow," or something like that.

Q. He says, "Go to hell, you will get killed anyhow," or something of that sort?

A. Yes, sir.

Q. Do you know why Anderson called on the mate for protection?

Question objected to.

66 A. It must be for the captain, so far as I know. It must be for the captain's protection.

Q. (By Mr. WHITE.) You did not understand it to be claiming any protection against the mate for any violence of the mate against the cook, did you?

A. No, sir.

Mr. MCINTOSH. Shall I press the question?

The COURT. Repeat the question.

Mr. MCINTOSH:

Q. Do you know why it was Anderson called on the mate for protection?

The COURT. I think the better way will be to show, if you can, by the witness what took place in his presence, and let the jury draw from

that what the situation was. The opinion of the witness is not testimony, but what took place in the presence and hearing of the witness is testimony.

Mr. McIntosh. I don't want his opinion on that point. I of course submit, as I would to any ruling of the court, with great cheerfulness to that, because I believe it to be correct.

Q. Do you know why this man called on the mate for protection? Do you know the fact he called on him?

The Court. He may testify to anything in his personal knowledge that took place between the mate and the witness, the mate and the prisoner, or the mate and prisoner and captain just immediately preceding the killing of the mate.

67 Mr. McIntosh:

Q. Did you see the difficulty between the captain and this man John Anderson?

A. Yes, sir.

Q. (By the Court.) Now, when was it?

A. In the morning just before this.

Q. (By Mr. McIntosh.) How long before?

A. Well, I couldn't give any particular time, but it was after eight o'clock.

Q. Inside of an hour, was it, or two hours?

A. Before the killing?

Q. Yes.

A. Oh, about an hour, I think.

Q. Now, what was the difficulty between the captain and this John Anderson?

A. It was about the dog, sir.

Q. Do you know what it was?

A. Yes, sir; I was standing right above the galley and heard it.

Q. Now, tell the jury what the difficulty was, from beginning to end.

Q. (By Mr. White.) Was the mate present?

A. No, sir; I didn't see him.

The Court. All the conversation you heard between the prisoner and the mate relative to the difficulty that occurred in your presence between the prisoner and the captain.

68 A. Well, it must be in connection with that.

Q. (By Mr. White.) Do you know whether it was or not?

A. I never heard the mate and Anderson have any row, sir.

The Court. Do you understand the question I asked you? When Anderson was having this conversation with the mate just before you say the mate was shot, was Anderson talking to the mate about the difficulty he had had with the captain that took place in your presence?

A. No, your honor.

The Court. Then how do you connect that with the transaction?

Mr. McIntosh. I understood the witness to say at first that this difficulty occurred between Anderson and the captain about the dog, and he made application to the mate to protect him from the captain, who treated him brutally.

Mr. White. He said he called him bad names.

Mr. McIntosh. I say what I understood him to say—that he treated him brutally, and that he called on the mate for protection. Now we have gotten to the point of his calling on the mate for protection, and I asked him what he called on him for protection for, and he says it must have been about the captain. Then I asked him what was the difficulty between Anderson and the captain about which he called on the mate for protection——

The Court. Let's get at it this way: What was it the prisoner
69 said to the mate? Repeat his language and we will draw our own conclusions.

A. He says, "Mr. Saunders, will you protect me until we get into port?"

Mr. McIntosh. Now, I ask the witness why did he say that to him, and he says on account of a difficulty with the captain.

Mr. White. He didn't say that.

The Court. We understand now perfectly what this remark was. Now detail anything else that took place between the mate and Anderson at that time. Just follow the conversation, if there was any further conversation.

A. That's all I heard, sir.

Mr. McIntosh. Now, may it please the court, I want to ask him why he said that to the mate. What was he talking about, if the witness knows—not his opinion—but if he knows why Anderson called on him.

The Court. He has already said about an hour before that there was a quarrel between the captain and Anderson.

Mr. McIntosh. And I want to know what that quarrel was.

The Court. How can he know that any more than we do? He can detail the circumstances.

Mr. McIntosh. He will know it if he was present and we were not present. If he was there during the quarrel between the captain and Anderson, he will know it better than we do, and about an hour after that he hears a conversation between the mate and the prisoner——

70 The Witness. It was not an hour after that.

Q. How long was it?

A. It was fifteen minutes, I reckon. It wasn't long after.

Q. Do you know what Anderson was talking about when he asked the mate to protect him?

A. That's all I heard him say—just asked him.

Q. But do you know what he was talking about to the mate when he asked him to protect him?

A. That's all I heard him say, and I didn't hear any more.

Q. You didn't hear him say any more to the mate, but it was Anderson talking. Do you know what he was talking about when he asked the mate to protect him—what he had reference to?

A. He just came up the step of the galley door and said that.

Q. He came out the galley door and said that?

A. Yes, sir.

Q. And you don't know any reasons he had for asking the mate to protect him?

A. I don't know anything else except against the captain that I know.

Mr. McIntosh. I think it is absolutely essential to me and a part of my defense that I should be permitted to connect the statements made by Anderson to the mate with the difficulty he had with the captain.

71 The Court. You may do so if you can, but you can't do it by a witness who says he don't know. The witness has given what took place. Now, as reasonable men, the jury can infer a reasonable deduction; that is the object of testimony; but you can't get a witness to state he knows a thing when he does not. He may detail what took place in his presence and the result may lead to a conclusion.

Mr. McIntosh. I may ask what took place between the captain and Anderson that morning; whether the mate was present or not, and let the jury infer whether Anderson was alluding to that when he asked the mate for protection.

The Court. You may ask it. We want all the facts in the case, and if it is not relevant testimony it will be excluded.

Mr. McIntosh. State what occurred between Anderson and the captain that morning.

A. Yes, sir. It was about the dog. He was down by the galley door and the steward threw some water on him and the dog came running up on deck on the deck load and ran after hollering. So the captain came up and said: "Did you throw hot water on that dog?" He says——

Q. (By Mr. White). Said it to who?

A. To Anderson. He felt it on the dog's back, where the water was.

Q. The captain did?

72 A. Yes, sir; and Anderson said he didn't throw hot water on him; said it was cold; and the captain called him all sorts of bad names: "You lying son of a bitch," "you lie," and the worst I ever heard, and from his elbow he struck the cook.

Q. (By Mr. McIntosh). You saw the captain strike the cook?

A. Yes, sir.

Q. Strike him? What did he do to him?

A. He struck him and called him all sorts of bad names, and after that he went up out of the galley.

Q. When he struck him did he knock him over on the stove?

A. I couldn't say. I was on top the galley, I only heard the noise down there. I only saw the captain's elbow out of the hatch like that.

Q. Didn't you see the captain hit him?

A. I saw him make for him; that's all I could see.

Q. Don't you know the fact, he did hit him?

A. I suppose he did; I heard a noise of something falling in the galley.

Q. Didn't you see this cook after he came out of the galley? How was he then?

A. Yes.

Q. Was he bleeding?

A. No, sir; I didn't see any blood.

Q. Was his nose bleeding?

A. Yes, sir; on his fingers here.

73 Q. Was his nose bleeding?

A. No, sir; not that I saw.

Q. Was he bruised at all?

A. No, sir.

Q. Was he shoved over on the stove? Was he burned?
A. That I don't know, sir.
Q. You don't know?
A. No, sir.
Q. Well, now then, shortly after that it was that the cook called on the mate for protection, was it?
A. Yes, sir.
Q. And the mate told him God damn him you will get killed anyhow?
A. Yes, sir.
Q. He asked him to protect him until he got into port?
A. Yes, sir.
Q. Do you know of any other circumstances? Had this captain been brutal or inhuman to this cook in any other way?

The district attorney objected to this question on the ground that the character of the captain and his treatment of the accused prior to this time was not an issue in this case, which was a trial for the killing of the mate, and was not a part of the res gestae of this case, and the objection was argued by counsel, but the court sustained the objection and ruled out the question, to which ruling of the court counsel for the accused excepted.

74 Mr. McIntosh. I mean by the interrogatories I am going to propound now to confine myself to that morning.

Q. Linn, what was the demeanor of this man when he was applying to the mate, was he complete broke down?
A. He looked like it, sir.
Q. He looked like it?
A. Yes, sir.
Q. Was he cowed?

Question objected to as calling for an opinion.

The Court. You can have the witness describe the conduct of the man and the jury will determine whether he was cowed or not.

Mr. McIntosh.

Q. What was his conduct when he was addressing the mate on this occasion?
A. I heard him say no more than that.
Q. What was his conduct, was he broke down? How did he behave when he was talking to the mate?
A. He was standing in the galley door, just on the steps going up.
Q. And he asked the mate to protect him?
A. Yes, sir.
Q. Did he do so in a suppliant sort of way?
Mr. White. Ask him how he did it?
Mr. McIntosh. How did he do it?
A. Of course he wasn't asking him in a joyful way.

75 Q. How many of you men were there that threw the mate overboard?
A. There were five.
Q. Did it take five men to throw the mate overboard?
A. Well, I suppose so. We were all there anyhow.
Q. They were all there?
A. Yes, sir.

Q. Was he dead?
A. Yes, sir.
Q. He was dead?
A. Yes, sir.
Q. Are you certain of it?
A. Yes, sir.
Q. You are certain he was dead. How do you know he was dead when you threw him overboard?
A. There was no move at all.
Q. No move at all?
A. No, sir; his hands were all white.
Q. His hands were all white? You can stand aside.

76 ANDREW MARCH.

I am thirty-six years old. I was born at sea and hail from Newfoundland. I am not an American citizen. I shipped on board the three-masted schooner "Olive Pecker" on the eleventh day of last June. The captain's name was J. W. Whitman and the mate William Saunders. The cook was John Andersen, whom I see sitting here. I had never shipped on the vessel before, and had never known the cook before, nor had I ever known Captain Whitman or the mate before. None of the men on board the ship had ever been shipmates with me before. William Horsburgh was the engineer of the donkey engine on board of the vessel used to hoist the sails and anchor.

I last saw Mate Saunders alive on the "Olive Pecker" on the sixth of August, 1897, when the vessel was about a hundred and fifty miles off the Brazilian coast. It was about nine o'clock, or somewhere thereabouts, in the morning. He was shot that morning. He was in the crosstrees of the foremast when I saw him. He was shot about that time that morning by John Andersen. I did not see him shoot him, but John Andersen stated to me himself that he did shoot him. I recognize the oil painting pointed out to me here as a correct picture of the "Olive Pecker." I saw the
77 mate after he was shot, lying between the capstan and the forcastle house at the left-hand side of the ship and on the forecastle head. He was dead, lying face downwards. I was in my bunk that morning when I heard the steward calling Mr. Saunders down from aloft. He sung out to him, "Mr. Saunders, come down from aloft," just like that. He says, "Mr. Saunders, come down here." I got out of my bed, went to the forecastle door and looked up on the deck load just forward of the main rigging, and saw the steward standing there on the deck load, somewhere aft of the forward cabin. He was armed. When he called Mr. Saunders down I heard the mate ask him what he wanted. He says, "Come down here." I went back to my bed then and never heard nothing before Mr. Saunders asked him what he had in his hand, and he told him "guns." I was then in my bed in the forecastle. I heard him tell the mate, when he was asked where he got the guns, that he got them in the cabin. He was asked who they belonged to, and he said the captain. He asked what he was doing with them, and he answered with a shot. When I heard the first shot, I heard Mr. Saunders begging him, "For God's sake don't shoot me." He shot three shots after that. I was standing in my berth then. I know the cook was on the house at that

time. After the shooting the cook came and called us out of the
78 forecastle. He says, "Come out here, boys, lower the boat and put me ashore. The captain and mate is dead and I am in charge of this ship." I got out of the bed and put on my shoes in a hurry, and the cook came back a second time and says, "Come out here, won't you? Come out here, Manuel," and he says, "Yes." We went out and went on the topgallant forecastle, and he ordered us to throw the mate overboard. The mate was lying on the forecastle head, on the left-hand side. The sails of the vessel were swinging at that time to the starboard, which left the left-hand side of the vessel clear back to the wheelhouse. The cook was armed when he ordered the mate's body to be thrown overboard, and he claimed then to be in charge of the vessel. I do not remember whether he caught hold of the mate's body and helped to throw it overboard or not. The mate had a marlin spike tied around his neck when the body was thrown overboard. A marlin spike is a big awl used to stick through the rope in splicing it. When it is used by a man going up and down the rigging a half hitch is taken over the point so it won't stick in his legs or get between the rigging going down. When it is around the man's neck it is tied with a string and with a half hitch on the point. He can't use it without taking the hitch off so as to
79 hurt anybody with it. The top of the forecastle house, where the cook was standing when he shot the mate, is about three feet higher than the forecastle deck, where the mate was standing when he was shot. To get to where Andersen was when he was shot, the mate would have had to step up those three feet on top of the forecastle house. A marlin spike was here produced and handed the witness, who stated that it was about the size and appearance of the one which the mate had on when he was shot. The witness then illustrated how the marlin spike was hanging about the neck of the mate, with a half hitch around its point, and how the marlin spike appeared when it was hanging about the neck of a man, with a half hitch over the point.

By a JUROR. Was it tied up like that when you saw the mate down on the deck?

A. I couldn't say whether the half hitch was around the point or not.

After the mate's body was thrown overboard we were ordered to the cabin to take the captain up and throw him overboard. The cook was armed at that time. When the mate's body was thrown overboard Andersen swore oaths at it. When he swore oaths at the body the Spaniard asked him not to curse the body that way. We all obeyed the cook and went aft and found the captain's body in the after cabin. Here the
80 witness identified the diagram, showing the inside of the after cabin, and marked number two. The captain's body was found sitting in his chair, dead, with both arms folded in his lap. He looked as if he was alive, with his head back on one side and a wound in the left part of his head, about an inch above the left ear. The captain was sitting in his chair near the sofa, on the starboard side of the vessel, the point marked on the diagram "A." John Andersen ordered the captain's body to be taken up and thrown overboard. Andersen was at that time armed. He assisted in throwing the body overboard. He swore at it when the body was thrown into the sea, calling it "a mean bastard." After the body of the captain was thrown overboard the steward ordered us to get

ready the boat. He then invited us down into the cabin to get a drink of whiskey. There was about two-thirds of a bottle of whiskey. He drank with us. After that was done the boat was got ready. Kerosene oil was thrown over the deck load and the ship was set on fire. Then we made for land in the sailboat. It was about two hours, I think, after the bodies were thrown overboard before we left the "Olive Pecker." At the time these bodies were thrown overboard there was no vessel in sight which could possibly have picked them up. We sighted a
81 steamboat that night while in the sailboat. The Spaniard had hold of the tiller and seemed to be steering for the steamboat. John Andersen took the tiller, jibed the sail over, and very nearly capsized it. We then ran away from the steamer and then lost sight of her. The "Olive Pecker" was burning a long time after we left her. We could see the light from her the next morning about daylight. When in the sailboat, going to shore, John Andersen made up statements that we should say if picked up. He told us to say that the ship caught on fire, and the captain and mate went down to put it out. The mate came up and jumped overboard, and the captain never came back. We sighted land about five o'clock in the evening of the day after leaving the vessel. We got to shore after night. We made a tent of the sail of the boat and stayed on the beach that night. The next morning we drew lots to see who should go together, and it fell to my lot first to go with the engineer, but we changed it and I went with Martin Barstad. The engineer went with Barrial. Then all four of us shortly came together and went along in company. Andersen and Lind went north and we went to the south. We tried to find an American consul and inquired for one at the first little town we got to, but there was none, so we went on and inquired at the next, and gave ourselves up to the chief of police,
82 I think they called it. We finally got shipment on a vessel going to Bahia. The Spaniard could talk the language of the country and he was the spokesman. When we got to Bahia, we found the cook, John Andersen, was there, the cook and John Lind. We went to the American consul at Bahia and were sent to the prison, and the next day we were called up for a statement, which all of us made in writing and signed. We then stayed there five weeks, or thereabouts, and were transferred aboard the man-of-war "Lancaster." We were brought to the United States in her and landed in Hampton Roads. John Andersen was brought along with us, the same John Andersen who sits here.

That morning before the captain was shot and before the mate was shot I heard a difficulty between the cook and the captain about the captain's dog. As I was going forward from taking my dishes back from my breakfast, I heard the dog holler. I was standing on the forecastle house. I saw the dog come out and run aft. The captain came out and went to the galley and asked the cook if he had been throwing water on the dog, and he said no. The captain went back and felt the dog. Then I saw the captain go in the galley, but I did not know what he did there. This was about fifteen or twenty minutes, I think, before
83 the captain was shot. I had been at the wheel of the "Olive Pecker" many times. While standing at the wheel, in the wheelhouse, looking forward, with the sails swinging to the right or starboard side of the vessel, you can see all the way along the left-hand side of the ship, on

top the forecastle house, or a man standing on top the forecastle house. The deck load did not interfere with seeing that. The wheelhouse has windows in front and a hatchway on top, so you can look up in the rigging. It has also a door opening on the side here. The sails were swinging to the starboard or right-hand side of the ship when the mate was shot. The cook's room on board the ship was in the after cabin, the same cabin in which the captain had a room. The cook waits on the captain and cooks for the officers and seamen aboard the ship. After the mate and captain were killed, John Andersen, the accused, said he was in charge of the vessel.

On cross-examination:

He testified that the water was thrown on the dog about half past eight. I turned in after this dog adventure, and the first intimation I had was hearing the cook calling Mr. Saunders from out of the rigging. I heard the cook calling Mr. Saunders from out of the rigging, and
84 got up and poked my head out of the forecastle door. I saw the cook standing there with two revolvers in his hands, and I then turned and went back to my bunk. I did not look any more. I turned in because it was my watch below. Anyway, I saw this man standing there with two revolvers in his hand. I didn't want to have anything to do at all with his business at that time. The first thing I saw after turning in my bunk and being called out, as I said, was Mr. Saunders lying out on the forecastle deck. He was dead. There appeared to be no life in him. I say this man intimidated us all at the pistol's point. He ordered us to throw the mate overboard. I obeyed his orders, because I wanted my life a little longer. After the captain was thrown overboard, we all went into the cabin and took a drink. I can't say that we took a drink at the pistol's point, but he made us throw the mate's body overboard. He did not tell me he would kill me if I did not, but I knew enough to know he would do it. There were four of us altogether. I did not have a knife. I do not know whether I went ahead or who went ahead when we went into the cabin to take a drink. We had to throw the body of the captain overboard because the cook ordered us to do it. I took orders from the cook because he gave me to understand he was in charge of the ship. At the time I knew he was, because he had
85 all the guns. It makes a big difference when he had all the arms.

Redirect examination:

I knew he had killed the captain and mate when he ordered us to do the things which we did do. I knew that he had the pistols.

By a JUROR. You all went down in the cabin, as we understand it, and you said that Andersen poured the liquor out and gave you a drink, did you not?

A. I didn't say Andersen poured the liquor out.

Q. I think you so stated.

A. I say Andersen ordered us down and gave us a drink.

Q. And you said he poured the liquor out?

A. I didn't repeat the words.

Q. Did he help throw the mate overboard?

A. I don't know whether he had his hands on him or not.

Recross-examination:

I don't know whether Andersen poured the liquor out for the
86 men or not. I was in the cabin and had a drink as well as the others. I can't say who had the bottle in his hand. Andersen had the bottle in his hand at one time, because he fetched it and brought it in the cabin and put it on the table.

By a JUROR. Did you see Andersen taking a drink in the cabin?

A. Yes, sir.

Q. When Andersen was taking that drink what did he do with the pistols he had in his hands?

A. I couldn't say, sir, whether he had two in his hands or one. I know he had one in his hand at the time.

Q. Did he keep that pistol in his hand while he was taking that drink?

A. He had that pistol in his hand all the time.

Q. That's all I wanted to get at, whether he put his arms down or not.

Redirect examination by Mr. WHITE:

Q. Is it or not a fact that one of the crew came up to you and told you to be more careful——

Mr. MCINTOSH. I object.

87 Mr. WHITE. I haven't asked the question.

Mr. MCINTOSH. You said something about what one of the crew told him to do.

Mr. WHITE. Don't answer it until the court passes upon it. Did any of the crew, just after the captain's body was thrown overboard, warn you to be particular how you talked to and dealt with the cook?

Question objected to.

Mr. WHITE. The purpose of it is to show that he was especially under the dominion or suspicion of the cook, and it will be followed up by the testimony of the person who will say he was ordered by John Anderson to go to this man.

The COURT. I think the object you have in view is pertinent, but I think the better way would be to ask him if he received any admonition, without designating its character, and, if so, what it was.

Mr. WHITE. Did you receive any warning from anybody, just after the captain's body was thrown overboard, to be cautious in your dealings with the cook?

A. Yes, sir.

Mr. MCINTOSH. I except to the question and answer.

Mr. WHITE. What was it?

A. William Horsburgh told me to beware of what I was saying in the hearing of the cook.

Q. When was that?

88 A. That was a few minutes after the captain was thrown overboard, I couldn't hardly say how long, but it wasn't very long.

Q. You had never had any row with the cook on the ship?

A. No, sir.

By the JURY:

Q. You didn't hear any pistol shot fired before the one that shot the mate, did you?

A. No, sir.

Q. Did that arouse your suspicions, seeing the cook on board the boat having two guns? It is not the custom for the cook to have guns on board.

A. I couldn't say.

Q. You never saw any before?

A. I couldn't say what that man carried on board a ship.

Q. That's the first time you saw him?

A. The first time I saw him.

Q. Do you think if you had come upon deck then he would have shot you if you interfered with him?

A. I couldn't hardly say what.

89 JUAN DE DIOS BARRIAL, sworn on behalf of the Government.

"I am a native of Spain and shipped on board of the American schooner "Olive Pecker" in the port of Boston in June last. The picture pointed to me here is a picture of her. I never shipped on board that vessel before and did not know any of the crew or any of her officers. John Linn, one of the seamen, was in the same boarding house with me in Boston for a little while—about four weeks. The captain of the "Olive Pecker" was J. W. Whitman, her mate was William Saunders, the engineer of the donkey engine on board the vessel was William Horsburg, and her seamen were John Linn, Andrew March, Martin Barstad, and myself. I last saw Mate Saunders alive on board that vessel on the morning of the 6th of August, 1897, when the vessel was about a hundred or a hundred and fifty miles off the Brazilian coast. On that morning I left the wheel of the vessel about 8 o'clock, being relieved by Martin Barstad, and went after my breakfast; then went to the forecastle and to my cabin. While I was lying down, after that—I do not know how long—I heard the captain's dog holler. Andrew March came in the forecastle and says, "The captain is having a racket with the cook," and I says, "What can we do? Let him racket," says I, and it was a little while before John Linn came and knocked at the window where I was sleeping. When he finished talking to me I heard the report of
90 four shots. I went in the forecastle in a narrow place between the engine room and my bunk. I went in there because I thought the cook wanted to kill us too. The engineer jumped on my bunk and got out, too. I heard the cook sing out in the door, "Come out here, boys! Come out here quick!" "Yes, sir," says I, "let me finish dressing." He says, "Come out here. I am in charge of the vessel." I went out and the first thing I saw was the mate lying on the top of the forecastle deck on the left-hand side, with his face downwards. The cook says, "Throw him overboard," and then I says, "Don't, cook; don't throw him overboard, he's alive." He says, "Throw him overboard; he's dead enough." We threw him overboard, and after we threw him overboard the cook says, "Now go aft and pick the captain up." When he threw the body overboard he cursed at the body. Then he ordered the men aft to throw the captain overboard. All the while he was armed with pistols. We went under his orders and into the captain's cabin. When we got in the cabin we saw the captain sitting in his chair with both hands in his lap, and his head leaning slightly to one side and o his breast. I thought he was alive. I saw he had a bullet to go throug

near the left side of his head. His body was taken up and thrown overboard. When his body was thrown overboard, the cook cursed it also. After it was thrown over he said, "Come on boys, I will give you a drink." We took a drink, and after we took a drink all came on deck and I said,

91 "We will make the stay sails and the topsails fast and if a squall strikes her we can manage the other sails, and we go right into Rio de Janeiro or Bahia. I sung out to Martin Barstad at the wheel, "Keep her off," and the cook says, "No, I don't want to go to the land." He was standing close to the rail. And he said, "Do you want me to be hung? There is nothing to be done but destroy the vessel," he said. Then he called me and said to me, "You are the sensiblest man on board this vessel, and I want to speak to you." "All right, cook," I says. He took me on top the galley and says, "I am a murderer, and I killed these people to save my life and your lives. Now, you fellows," he says, "you are guilty of helping me throw the bodies overboard, and before you leave the vessel you will be as guilty as I am. You ain't got nothing to fear." Says he, "Many a vessel leaves port and they don't know where they go, and there's nobody to look after us for a long, long time, and we will have time to run away." I told him I had nothing to fear with the vessel in port. I says, "Look here, cook, destroy the vessel, its a terrible thing, its worse than what you have done already. Call all hands here and tell us what you want to do and where you want us to sail ashore, and we will help you as much as we can, and let us go into port." "No, no," he says, "that won't do; the vessel must be burned." He ordered a small boat to be made ready, and everything was made ready and then he took us down into the cabin and he says, "I didn't kill these people to rob the vessel. I grant you all fellows clothes out of this large chest," and we went in and everybody

92 took some clothes, and the cook says, "You fellows can put on your best clothes," and he gave me a suit of clothes, and he says, "You don't want to take anything;" so we went forward and put on our best suit of clothes, and the cook had us to pour oil on the deck. The cook called us to hurry up and spread the oil on the deck. I didn't want to do this. I went to the forecastle and the cook came and said, "What are you doing there? Come and give your hand with this oil." I says, "Yes, cook; let me finish shaving and I go." When I went on deck I could see that the oil was all ready. It had been spread over the deck. The cook then told us to lower a boat and it was lowered, and Andrew March unhooked the tackle and we took the boat alongside the vessel and I jumped in, too. Provisions were then put in the boat and when everything was ready Anderson called to me, "Come up and light the fire." "Well," I says, "let me keep the lookout on the boat; it might smash against the vessel." So he called Andrew March, and the first time he called Andrew he did not come, so he called him again in wild words and March went up. John Linn put the boat right in the stern of the vessel. I was in the boat and I don't know who set the vessel on fire, but she was on fire when we sailed away. I saw the light from her burning late in the night. When we sailed away from the boat I had charge of the tiller of the sailboat. It was about two or three hours after the captain and mate were thrown overboard that we left the vessel. After dark that

evening we sighted lights of a steamer coming towards us. I was steering the sailboat to go for the steamer. When John Anderson saw
93 this he took the tiller away from me, and in doing so jabbed the boat and almost capsized her. We reached the shore on the coast of Brazil about thirty hours after leaving the burning "Olive Pecker." We spent the night on the shore, making tents of the sail of the boat. When leaving the burning vessel John Anderson fired his pistol three times, saying, "That's American man-of-war style." While going to the shore in the sailboat he told the men if they should be taken up they must say that the "Olive Pecker" caught fire, and that the captain and mate went down in the hatch to put her out, and the captain never came up, and the mate came up with his clothes afire and jumped overboard. When we got ashore the next morning we drew straws to see who should go together. John Anderson and John Linn went together, and started in a northerly direction. The other four of us started in a southerly direction. We went together to a little village, and I went and reported to the Brazillian authorities about what had occurred on the vessel. After I told him I says, "Now I want you to send a telegram all along the coast to Bahia." He said, "I can not do that because the case did not happen in my district. All I can do is to give you fellows a passage on a vessel going to Bahia." I told him it would be too late then to arrest the cook, and begged him to send that telegram, telling him that if there was any expense the American Government would pay everything. He gave us passage on a vessel that was just coming in that day. We went on board this steamer, and I told
94 the captain of the steamer everything that had happened, and I told him I feared the man wouldn't send the telegram, and the captain says, "Of course we will help you all we can," and said that the next place the steamer stopped at he would tell the captain of police. We did stop at a little place, and the chief of police came aboard and asked if I could talk Brazilian, and I told him yes, and told him everything that had happened on the "Olive Pecker," and he sent soldiers over to Belmont to arrest the cook, but the cook had left when the soldiers got there. The captain of police then sent a telegram to Bahia, and we all went on to Bahia in that steamer. When we got there we went to the American consul. We found that John Anderson and Linn had been arrested and were in prison. We made statements to the American consul, which were written down, and we were kept in prison until put aboard the American vessel "Lancaster," which brought us to Hampton Roads in Virginia, and we were then turned over to the U. S. marshal, and by him put in the city jail in Norfolk.

When the mate's body was picked up on the deck of the forecastle head there was a marlin spike tied around his neck by a rope. It had a half hitch on the point of the rope with the point upwards. It was hanging around the mate's neck when he was thrown into the sea.

Cross-examination.

(Here follow literally the stenographic notes.)

95 Cross-examination by Mr. McIntosh.

Q. After the cook here had killed the mate, didn't he tell/ you you might put him in iron?

A. Yes, sir; he came and he says, "Now you fellows can put me in irons and carry me to port, if you want."

Q. And give me to the American consul?

A. No, sir; the same words I told you, sir. "Now you fellows," he says, "can put me in irons and take me in port if you want." I says, "No, no, cook, I no put you in irons," because he looked right in my face; and I says, "Why don't you throw your revolvers away?"

Q. He offered to give himself up to you, holding out his hands, and said: "Put me in irons?"

A. He didn't throw his revolvers away.

Q. He didn't?

A. No, he didn't.

Q. Did he hold out his hands to put him in irons?

A. With his revolvers, yes; and I says, "No, no, cook, I won't put you in irons; no, no."

96 Q. Do you mean to say he had the revolvers in his hands when he offered you to put him in irons?

A. Yes, sir.

Q. Who was there besides you?

A. All hands was on deck.

Q. All hands were on deck?

A. Yes, sir.

Q. Didn't you put your arm around this man's neck and tell him he was all right, or something like that?

A. Was all right?

Q. Yes.

A. Around his neck?

Q. Yes.

A. No, sir.

Q. You didn't?

A. No, sir; I went to him and says, "No, no, cook, I no put you in irons; no, no."

Q. Didn't he break down and cry?

A. Who?

Q. The cook.

A. He laughed as happy as could be.

Q. He was as happy as could be?

A. It looked like it. I do not know if he was.

Q. While you mean to say that when he offered to put himself in irons he had the revolvers in his hands?

A. Yes, sir.

97 Q. When did that happen—what time, about?

A. I couldn't say what time it was.

Q. I mean in respect to these events—after the mate was shot?

A. Yes, sir.

Q. And you had thrown the mate overboard?

A. Yes, sir.

Q. After you had thrown the captain overboard?

A. Yes, sir.

Q. When you went down in the cabin to get a drink did he have his revolvers in his hands then?

A. Yes, sir.

Q. All the time?
A. Yes, sir.
Q. All the time?
A. Yes, sir.
Q. When he took the drink did he have the revolvers in his hands then?
A. Yes, sir.
Q. In both hands?
A. When he has no two he has one.
Q. When he had no two he had one?
A. Yes, sir.
Q. Did he threaten to shoot you?
98 A. That man for to save his life could kill all the rest if we did not go by his orders.
Q. If you all did not go by his orders he would kill you?
A. So we feared anyhow.

WILLIAM HORSBURGH, on behalf of the prosecution, sworn.

Examined by Mr. WHITE:

Q. Tell the court what your name is?
A. William Horsburgh.
Q. To what nation do you belong?
A. A Scotchman.
Q. Did you ship last June on the "Olive Pecker" as engineer?
Yes, sir.
Q. What was the sort of engine on the vessel that you had charge of?
A. A donkey engine.
Q. Just for hoisting the sails and anchor?
A. Yes, sir.
Q. Horsburgh, who was captain of the vessel?
A. I believe he was Captain Whitman, sir.
Q. Do you know his first name?
A. No, sir.
99 Q. Who was the mate?
A. Mate William Saunders.
Q. And you were engineer?
A. Yes, sir.
Q. Who was the cook?
A. John Anderson.
Q. Is it he who sits here [pointing to prisoner]?
A. Yes, sir.
Q. You recognize him as the man?
A. Yes, sir.
Q. Who were the seamen?
A. Juan De Dios Barrial, Martin Barstead, John Linn, and Andrew March.
Q. When did you last see Mate Saunders alive on board that vessel?
A. The morning before I went to sleep—that same morning.
Q. What morning?
A. The morning of the tragedy.

Q. What morning was that—what day of the month?
A. The 6th of August, I think, sir.
Q. You saw him that morning last alive?
A. Yes, sir.
Q. Where was he when you last saw him alive?
A. I saw him come out of the cabin after he finished his breakfast.
Q. What time, about, was that?
100 A. A few minutes after eight, or a few minutes before 8.
Q. Did anything happen to him that morning?
A. Not to my knowledge.
Q. To the man, I mean.
A. Well, he was shot.
Q. Who shot him?
A. I believe it was John Anderson, sir.
Q. Where was he shot—what part of the ship?
A. The forecastle head—the port side of the forecastle head.
Q. Look at that picture of that vessel alongside of you, and say if that is a correct picture of the "Olive Pecker"?
A. It looks very much like her.
Q. You say he was shot on the left-hand side, which is the port side. Whereabouts?
A. Right about here, sir [pointing to picture].
Q. Did you see him?
A. After he was shot, sir?
Q. How was he lying?
A. Lying with his face down, with his head towards the forward part of the vessel.
Q. His head towards the forward part of the vessel and his feet towards the aft part?
A. Yes, sir.
Q. What time was it you saw him there?
101 A. It was between nine and ten, sir.
Q. How long after you had seen him alive when he was coming out of the cabin—about how long, think you?
A. About an hour, or three-quarters.
Q. Now tell, if you please, what you know just immediately before the shooting of the mate and what happened immediately after the shooting of the mate. Tell the jury what you know.
A. I heard a noise in the cabin, sir, that woke me out of sleep.
Q. Where were you?
A. In the fore part of the aft cabin.
Q. Were you in your room?
A. Yes, sir.
Q. Here is a diagram of the arrangements of the cabin which is the aft part of the house. Here is the stern of the vessel.
A. I was here, sir, in this berth.
Q. In this room marked as the second mate's room?
A. In this berth.
Q. Lying in the berth of the room marked second mate's room?
A. Yes, sir.
Q. Which is the right-hand corner of the aft cabin house?

A. Yes, sir.

102 Q. You were lying there asleep?

A. Yes, sir.

Q. What occurred?

A. I heard a noise in the aft cabin.

Q. What was the noise you heard?

A. I believe it was the shooting of the captain?

Q. Did it awake you?

A. Yes, sir. I thought at first it was the captain's chair sliding to the side of the cabin.

Q. You first thought it was the sliding of the captain's chair, and afterwards——

A. I afterwards found out when Anderson came to the companion way and told me to come on deck; he had killed the captain.

Q. You say immediately after you heard that noise Anderson came out? Did he come to your window?

A. He came to the companion door.

Q. That door leads right down by your door, doesn't it?

A. Yes, sir, there is a door between that. The door was closed.

Q. He came down and said what to you?

A. Sung out to me to come out on deck; he had shot the captain.

Q. He sung out to you to come on deck, and said what?

103 A. That he had shot the captain, or that he had killed the captain.

Q. What did you do?

A. I came out on deck.

Q. Where was he then?

A. He was on the weather side.

Q. You mean the port side?

A. The port side.

Q. What was he doing?

A. Walking forward, and I went along the lee side and under the forecastle head, and through in the forecastle.

Q. He was going along the left side of the vessel, and you went along the right side under the lee of the forecastle and into the forecastle?

A. Yes, sir.

Q. What did you do then?

A. I told the men to come out; the cook had killed the captain.

Q. What did you hear then? Go on and tell the story. What happened?

A. Then I heard the shots go on the forecastle head immediately after I told them that.

Q. How many shots did you hear?

A. It sounded to me like about three.

Q. What did you do then?

104 A. The cook sung out for us to come on deck, and when he sung out that I went out through the window of the forecastle and the others went out through the door.

Q. What occurred then?

A. I came up on deck, and he ordered him thrown overboard.

Q. The cook, Anderson, ordered what to be thrown overboard?

A. The mate.

Q. Where was the mate lying?
A. On the port side of the forecastle head.
Q. With his face down, or on his back?
A. His face down; head forward.
Q. Did the cook order the men to throw him over?
A. Yes, sir.
Q. What did he have in his hand then?
A. Who, sir?
Q. The cook.
A. He had two revolvers, sir.
Q. He had two revolvers?
A. Yes, sir.
Q. Did he say anything about being in charge of the vessel?
A. When we were in the forecastle he sung out, "Come out, boys; I am in charge of the vessel." When I got on deck he made me to understand when the captain and mate were gone he was in charge of the ship, and told me I had nothing to do with it.
Q. You were the engineer?
A. Yes, sir.
Q. You say he ordered the body thrown overboard?
105 A. Yes, sir.
Q. Was that done?
A. That was done; yes, sir.
Q. Did you see anything about the neck of the mate when he was picked up?
A. I saw a marlin spike.
Q. Was it like this [exhibiting the one already introduced]?
A. I do not just remember how it was. I did not take notice until he was going overboard.
Q. Was it hanging about his neck?
A. It was hanging around his neck.
Q. You can't remember whether the point was up or down?
A. No, sir; I do not remember whether there was a hitch in the point or not.
Q. Was his body dead when it was thrown overboard?
A. It appeared to be, sir.
Q. What occurred then?
A. He ordered us to go aft and throw the captain overboard. We went down in the cabin and found the captain in the chair, so we took him up on deck and threw him overboard. Then after that he told us to go down and he would give us a drink; so we went down in the cabin and had a drink. I, for my part, just put it to my lips. I did not drink any, anyway.
Q. When you went into the aft cabin which room was the cap-
106 tain sitting in; his body?
A. He was sitting about there [referring to diagram already introduced].
Q. There is a sofa right here [pointing]?
A. Yes, sir.
Q. He was sitting in the chair near the sofa?
A. Yes, sir.

Q. Which way was he facing?
A. Facing forward.
Q. Did you notice any wound in his head?
A. Yes, sir.
Q. Where was it?
A. It looked to me as if it was a bullet wound in the left temple.
Q. And he was facing forward?
A. Yes, sir.
Q. Are there doors or not from the forward cabin into the aft cabin here on both sides?
A. On both sides, sir.
Q. Where is the mate's room?
A. Here, sir.
Q. The mate's room is in the opposite corner from yours?
A. Yes, sir.
Q. And the door opens from the mate's room into this forward cabin?
A. Yes, sir.
107 Q. Then the door comes through right here, and the captain was sitting here in his chair, with a bullet wound in the left side of his head?
A. Yes, sir.
Q. How was he sitting? Describe to the jury how he was sitting.
A. Something like this [illustrating].
Q. Describe how and who took his body up?
A. We all took up his body, all but the man at the wheel, Martin Barstead.
Q. Was he taken up the aft companion way?
A. Yes, sir; thrown over the weather side.
Q. Which was the left-hand side of the ship.
A. Yes, sir.
Q. Did he say anything when the body was going overboard?
A. He called him a brute, and everything like that, and said he would never punish any more sailors.
Q. He called him a brute? Anything else?
A. And wished his soul to go to hell.
Q. Did he say anything when the body of the mate went overboard?
A. Yes, sir; he called him a swone, and a brute, and sons-of-bitches, and everything of that kind.
Q. That was to the dead bodies as they went overboard?
A. Yes, sir.
108 Q. Then what happened after the captain's body was thrown overboard?
A. He invited us down to have a drink.
Q. You did not take any, you say?
A. I put the glass to my lips, but I will take an oath that didn't a drop of it touch my palate.
Q. While you put the glass to your lips not a drop touched your palate. Some other man has said that. How much whiskey was there?
A. About three parts of a bottle, as near as I can remember.
Q. How much would it hold?
A. One of those big long white bottles.

Q. About a pint and a half has been said here. Was that about the measure of it?

A. I can't say, sir. It is one of those long white bottles with a long neck.

Q. Nobody got drunk, did they?

A. Not to my knowledge. I did not see anyone under the influence.

Q. Tell what happened now, after the drinks were taken. What occurred then?

A. Then we got the boats ready and provisions, and everything like that.

Q. Who ordered that to be done?

109 A. Anderson.

Q. Was he armed all that while?

A. Yes, sir.

Q. Were all you men frightened into what you did?

A. I know for my part I was frightened, or I never would have got through that one day.

Q. You knew he had killed the captain and mate?

A. Yes, sir.

Q. And was armed?

A. Yes, sir.

Q. And he was in charge of that vessel; that they being dead he was next in charge?

A. Yes, sir.

Q. And he ordered what was done to be done?

A. Yes, sir.

Q. And kept himself armed all the time?

A. Yes, sir.

Q. Did he say anything to you about anyone of the crew, to go and ask him whether he was going to obey his orders or not?

A. Well, he sent me—this is the expression he used: "Go to pump Andrew March." He said he was frightened of Andrew March, and told me I was freckle-minded.

Q. He told you you were fickle-minded?

A. Freckle-minded, he said.

Q. Did you obey him?

110 A. I went and told Andrew to be careful what he said to the cook.

Q. Did the cook make you say to him that you would obey him?

A. I put up my hand and swore that I would be true to him.

Q. Then he was armed and forced you to do it?

A. Yes, sir.

Q. Then the provisions were taken on board? What time did the boat leave the Olive Pecker?

A. I do not just remember, sir. It was in the afternoon.

Q. Did he order you to put any oil on the deck load?

A. No, sir; ordered me to open the barrel.

Q. Go ahead and tell that.

A. He ordered me to open a barrel.

Q. And do what with it?

A. Let it go on the deck.

Q. Was that done?
A. Yes, sir.
Q. Did he order you to apply the torch to it?
A. Yes, sir.
Q. Where was he standing then in reference to yourself? Was he standing over you?
A. Standing over me.
Q. What did he have in his hand, if anything?
A. I do not just remember.
Q. Was he armed at that time?
111 A. He had arms on him to the time of leaving the vessel, and had them in the boat.
Q. Do you know whether or not there were cartridges in the captain's cabin which he got?
A. Yes, sir; I saw him load the revolvers myself in the aft cabin. He took the few empty cartridges out and loaded the revolver up again, and the cartridges in that drawer he took and put in his pocket.
Q. What occurred after you left the vessel in the sailboat?
A. After we left in the sailboat he fired three shots in the air.
Q. With his pistol?
A. Yes, sir.
Q. Did he say anything when he did it?
A. He said that was the American man-of-war style, or the American style. I do not remember. I think, the American man-of-war style.
Q. During all the time you were going ashore in the sailboat did he tell you all what you should say if you should be picked up?
A. Yes, sir.
Q. What did he tell you to say if you were picked up?
A. That the captain went down in the hold and he never came up again, and the mate went down to see where he was, and he came up on fire and jumped overboard.
112 Q. To say the vessel took fire?
A. The vessel took fire, and the captain went down to see where the fire was, and the mate went down to see where the captain was, and came up on fire, and jumped overboard.
Q. That is the story he told you to tell if you were picked up?
A. Yes, sir.
Q. Did you see any vessels after you left the "Olive Pecker?"
A. It was after dark when we sighted her.
Q. You sighted her by her lights?
A. Yes, sir.
Q. What occurred then, if anything?
A. The Spaniard Juan De Dios Barrial was at the tiller, and I do not just remember the one who reported the light forward in the boat. He said there was a light forward, and Anderson sung out where it was, and he told him, and he took the tiller from the Spaniard and jibed the boat over and very near capsized the boat.
Q. He took the tiller and jibbed the boat over, and very near capsized her?
A. Yes, sir.
Q. Did you sail on until you got ashore?
A. Yes, sir.

Q. What time did you get ashore?
A. It was the following evening.
113 Q. When you got ashore did you divide into parties?
A. We cast lots for who should go partners.
Q. Whose lot did it fall to go with Anderson?
A. John Linn.
Q. Did they go in one direction?
A. John Linn?
Q. And Anderson?
A. Yes, sir.
Q. And four went in one direction?
A. Yes, sir; the opposite direction.
Q. Was any report made by any of the four about what occurred on board the vessel?
A. Yes, sir; I believe so. I could not understand the language, but I believed it.
Q. Who told you?
A. Juan DeDios Barrial.
Q. He could speak the language, and told you he made the report?
A. Yes, sir.
Q. How did you get from where you landed to Bahia, if you did get to Bahia?
A. We went in a steamer.
Q. From what point?
A. From Porto Segulo.
Q. Do you know whether the Spaniard made it known to the
114 captain of the steamer on which you took passage to Bahia?
A. Yes, sir; he told me he did.
Q. You only know it from the fact that he told you so?
A. Yes, sir.
Q. When you got there, did you hear anything about Anderson?
A. I heard he was in prison.
Q. He had been arrested?
A. Yes, sir.
Q. What was done with you all, or what did you do when you got to Bahia?
A. They took us to the American consul and put us in prsion.
Q. How long did you stay there?
A. Over a month, I think, sir.
Q. What became of you then?
A. We were sent aboard the American man-of-war and brought to this port.
Q. What American man-of-war?
A. The Lancaster.
Q. That is the same John Anderson that was brought with you?
A. Yes, sir.
Q. And the same man who was on the "Olive Pecker," and shot the captain and mate?
A. I believe so.
115 Q. Who said he killed the captain and mate?
A. Yes, sir.

Q. Who was put on the Lancaster at Bahia and brought to this port?
A. Yes, sir.
Q. I understand when those shots were fired that you were then in the forecastle house or outside on the right-hand side and under the lee of the forecastle?
A. The shooting of the mate?
Q. Yes.
A. I was in the forecastle.
Q. You did not see the shooting?
A. I did not see it.
Q. Did you hear the cook call the mate from the rigging?
A. Yes, sir; when I was going along the lee side.
Q. What did he say?
A. He sung out, "Mr. Saunders, come down." He sung out several times. Mr. Saunders asked him what he had there, and he said, "Gun." That is the last I heard of it until I went in the forecastle.
Q. Then you heard the shots fired?
A. Yes, sir.
Q. You did not see the shooting when it actually occurred.
A. No, sir.

116 Q. How high is the roof of the forecastle house from the top of the forecastle?

A. I should judge about six feet and a half, sir, or seven feet.
Q. Maybe you do not understand.
A. Yes, sir; I understand quite well.
Q. The forecastle deck?
A. Oh; the forecastle deck?
Q. The forecastle deck up here is how much above the top of the forward house? [Pointing to picture of ship.]
A. About as high as this chair; because you could sit on it like that.
Q. It has been testified here that it is about three feet.
A. Yes, sir.
Q. It was some distance below the top of the forecastle house?
Mr. McIntosh. He said it was seven feet first.
A. From the main deck, that is what I said.

Mr. White:

Q. The main deck is below the forecastle deck?
A. Yes, sir.
Q. And you said from the top of the forecastle deck house down to the main deck was about six feet?
A. Yes, sir.

117 Q. But you say the top of the deck known as the forecastle deck is about the distance from the top of the forecastle house—about the height of the chair?

A. Yes, sir; because I could sit on it. I would often go forward on lookout at night with the lookout, and would sit just as I am sitting here on the top with me feet on the deck.

Cross-examined by Mr. McIntosh:

Q. Hornburgh, when did you ship on board the "Olive Pecker?"
A. Sometime in June, sir.

Q. Sometime in June?

A. Yes, sir.

Q. When was the first time that you saw the mate on the morning of the 6th of August of this year?

A. I am not sure, but I think it was after breakfast.

Q. After breakfast?

A. Yes, sir; I think so.

Q. Now, the circumstances are not exactly fresh in my memory from yesterday, and I wish you would state over again to the jury what transpired immediately before the killing of the mate, so far as Andersen was concerned. Did you hear any altercation between him and the mate?

A. Not between him and the mate, sir.

Q. Did you hear any altercation between him and the captain?

118 A. Yes, sir.

Q. What was that?

A. I heard the captain accusing him of throwing hot water on the dog.

Q. What occurred after that?

A. I can not say; I was in my bunk. I heard the disturbance between them.

Q. And you went to your bunk?

A. I was in my room at the time.

Q. When you heard it?

A. Yes, sir.

Q. Now, your room was in the cabin, and not in the forecastle?

A. In the forward part of the after cabin.

Q. Now, you recognize that diagram, do you not [exhibiting diagram numbered two]?

A. I do, sir.

Q. Point out where your room was, and where you were when you heard this altercation between the captain and the cook.

A. I was in this room [indicating on diagram].

Q. That is with the bow towards you?

A. Yes, sir; that is on the starboard side.

Q. Where did the altercation occur; in what part of the vessel?

119 A. About here, sir; between the cabin and galley. I think the cook was in his galley; I am not sure. It sounded as if about there.

Q. There is a window right there; was that window open?

A. Yes, sir.

Q. How far is that window from that galley door?

A. I don't know, sir; I should judge about ten or fourteen feet; I am not sure.

Q. Ten or fourteen feet?

A. Yes, sir.

Q. Did you hear any blows pass between the cook and the captain?

A. Between the cook and the captain?

Q. Yes.

A. I can't say that I heard any blows. I heard the cook pleading with the captain not to hurt him; not to strike him.

Q. You heard violence between the two?
A. I did, sir.
Q. At that place?
A. I did, sir.

Q. Then what occurred after that; what was the next thing
120 that occurred in reference to this business to which your attention was directed?

A. There was silence for a few minutes. It sounded to me as if the captain had gone over and felt the dog's back to see if any water had been thrown on him. He came back and called the cook a liar; he did throw hot water on the dog.

Q. He came back and said that the cook was a liar, that he did throw hot water on the dog, and it was then you heard the cook pleading with the captain not to hit him?

A. Yes, sir.

Q. Now, then, I understand you remained in your bunk for some time, did you not?

A. In my room, yes, sir.

Q. What occurred then?

A. Well, there was silence after that. At the time I was reading the Youths' Companion, and I went and turned in.

Q. To what was your attention next directed?
A. I went to sleep.
Q. Well, after that?
A. The cook came to my door and waked me up.
Q. The cook came to your door and waked you up?
A. Yes, sir; and he sung out to come up on deck.
Q. He sung out to you to come up on deck?
A. Yes, sir.

Q. What did he say to you?
121 A. He told me he had killed the captain.

Q. Then what did you do?
A. I came up on deck.
Q. You came up on deck?
A. Yes, sir.
Q. What did you do then?
A. I went along the lee side and into the forecastle.
Q. You went along the lee side into the forecastle?
A. Yes, sir.
Q. Well, did you call the men there?
A. I did.
Q. Did they come out?
A. They came out after the cook sung out to them to come out.
Q. They came out after the cook sung out to them to come out?
A. Yes, sir.
Q. Who was in the forecastle at the time?
A. March and Barrial, the Spaniard.
Q. You three?
A. Yes, sir. Barstad was at the wheel, I believe.
Q. Where was Lind?
A. On the deck somewhere.

122 Q. You went forward to the forecastle and you called those two men?

A. Yes, sir.

Q. The Spaniard and March?

A. Yes, sir.

Q. Did you have any altercation or any quarrel with the captain that day?

A. No, sir.

The COURT. That question, without any explanation as to the purport of it, is ruled out.

Q. Now, after you were called out of the forecastle did the cook order you to throw the mate's body overboard?

A. Not me, personally. He ordered us to throw them overboard.

Q. He ordered you all to throw them overboard.

A. Yes, sir.

Q. Were you not second mate of that boat, practically.

A. I was acting second mate, but I wasn't second mate; I didn't sign as second mate.

Q. You were acting second mate at the time?

A. Yes, sir.

Q. Why were you not in charge after the mate was killed?

A. Because Andersen told me he was in charge of the ship.

123 Q. Yet you were second mate of that ship, or acting second mate, though you didn't sign for it?

A. Yes, sir.

Q. You were acting second mate and you were the next man to the mate after he was killed?

A. I was if I signed for it, I suppose. I don't know whether I was or not.

Q. Were you not performing that duty on board that ship whether you signed for it or not?

A. I was trying for it.

Q. Was the mate dead when you threw him overboard?

A. He appeared to be.

Q. Well, then, after you went down into the captain's cabin, did he order you to throw the captain overboard?

A. Not personally; he ordered the crowd.

Q. Describe how you went in the cabin.

A. We went down the after companionway.

Q. Did Andersen go ahead of you, or did he go behind you?

A. I can't say that, whether he did or not.

Q. Was he armed at the time?

A. Yes, sir.

Q. Isn't it a fact that you were all armed?

124 A. I wasn't armed for my part, and I didn't see anyone else armed.

Q. Was John Lind armed?

A. He was in the boat; he had an empty revolver.

Q. Do you know that it was an empty revolver?

A. Yes, sir; because I saw it and it was not loaded.

Q. You saw it, and it was not loaded?

A. Yes, sir.

Q. Where did he get that revolver from?

A. He got it from Andersen, so he says; I can't say that.

Q. Now, when you all went down there to take a drink, was there any compulsion used at that time to take a drink; did he force you all to go down there into the cabin?

A. He says, "Come down here, boys, and get a drink."

Q. And you all went?

A. All went.

Redirect examination by Mr. WHITE:

Q. You say that you were not compelled to take a drink. Were you or not all made to understand by the cook that he was in charge of the ship, and that you had to do as he directed you to?

125 A. Yes, sir; when the captain and mate were gone he was in charge of the ship.

Q. Did he not take you as engineer of the boat and tell you that you were not in charge?

A. He told me personally on the deck load. He says to me, "You have got nothing to do with it; when the captain and mate are gone I am in charge of the ship."

Q. Did he not, then, having just killed the captain and mate, make you all to understand that if you did not do as he wanted you to do in all respects that he would injure you?

A. Well, sir; I can not say that he said that.

Q. Did he not make you to understand by his manner that he was in charge of the ship?

A. Yes, sir.

Q. And that you had to obey him?

A. Yes, sir.

Q. Horsburgh, you didn't hear the mate or see the mate do anything to the cook that morning of the 6th of August, did you?

A. No, sir; not to anybody.

Q. And you never heard of his doing any harm to anybody aboard that ship?

A. No, sir; for my part, he was friendly to me.

126 Q. Was he unfriendly to any of the others?

Objected to by Mr. McIntosh as undertaking to prove the character, etc., of the mate.

(Question withdrawn.)

Q. You heard no trouble between the mate and the cook that morning, nor any harsh words from the mate to the cook?

A. Not from the mate, Mr. Saunders.

Q. Horsburgh, I don't remember whether you stated yesterday or not whether, when the boat left the "Olive Pecker," there was anything done particularly by the cook in the way of asserting himself; did he say anything, or do anything, or shoot a pistol, or anything of that sort?

A. He fired three shots.

Q. Did he say anything when he fired them?

A. He said that was either American style or American man-of-war style.

Q. What was the manner of John Andersen from the time he called you men out and told you he was in charge of the ship until you parted from him on the shore; I mean to say, how did he appear—simply as cook, or seaman, or not, or a man claiming to be in command over you men?

A. Like a man actually in command, sir.

127 Q. He was asserting himself from that time till you parted from him as a man in charge of the ship before she was burned and left; also while you were in the boat going to land, and after you got to land?

A. Yes, sir.

Objected to by counsel for accused as leading.

The COURT: The misfortune about the matter is that the question was asked and answered before the objection was raised.

Q. Horsburgh, did you say yesterday whether or not Andersen told you men, while you were in the boat going ashore, what you should say in the event you were picked up?

A. Yes, sir.

Q. What was it he told you to say?

A. That the vessel took fire and the captain went down in the hold to see where the fire was; that the mate went down to see where the captain was and came up all afire and jumped overboard.

Q. I don't remember whether I asked you how the sails of the "Olive Pecker" were swinging.

A. To the starboard.

Q. Or right side?

A. Yes, sir.

128 Q. Could a man in the wheelhouse, looking through the windows, see forward to where you saw the body of the mate lying on the forecastle head?

A. Yes, sir; I am positive.

Q. There is nothing to obstruct his view?

A. No, sir.

Mr. WHITE. If your honor please, I want to trespass upon the court to the extent of recalling a witness on a single point—as to the altercation between the mate and the cook and the alleged reply of the mate to the cook.

JUAN DE DIOS BARRIAL recalled.

By Mr. WHITE:

Q. Barrial, on the morning of the 6th of August, the morning on which you, on yesterday, stated the mate and captain were killed and their bodies thrown overboard, did you hear the mate say anything, kindly or unkindly, to the cook?

A. No, sir. I didn't hear nothing.

Q. You heard nothing, then, from the mate to the cook that was unkind in any way?

A. No, sir.

129 Q. Did you hear anything from the mate to the cook that day at all that was unkind?

A. No, sir; I did not.

Captain A. J. HALL, recalled:

Q. Captain, about how far is it, please, from the window of the wheelhouse of the "Olive Pecker" to the capstan, or we will say to the deck or forecastle head—how many feet?

A. About a hundred and forty-five feet. She was about a hundred and sixty feet on her keel and about a hundred and eighty feet over all. It is about a hundred and sixty feet from here to here [indicating on painting fore and aft], and from the gallant forecastle to the forward house here [indicating on painting] is twenty feet. She was 180 feet over all; forty feet come off that, and that would make it 140 feet from the wheelhouse to the after part of the forward house, where he says he fired the shot.

Q. Captain, could a man standing in the wheelhouse, and looking forward, see a marlin spike of about the size of the one you now hold
130 in your hand, or a little larger, hanging about the neck of a man near the capstan on the forecastle head?

A. Yes, sir; with all ease.

Q. Have you or not to-day measured off a hundred and fifty feet and put up the marlin spike which you hold in your hand to see whether you could easily see it at that distance?

A. I have, sir.

Q. Can you see it with perfect ease?

A. I can, sir.

Question and answer objected to by counsel for accused on the ground that the former is purely hypothetical.

MARTIN BARSTAD, recalled:

By Mr. WHITE:

Q. Barstad, did you hear Mate Saunders, on the morning of the 6th of August, when he was killed, the morning when he was killed, at any time during that morning, say anything unkind to the cook, John Andersen, at all?

A. A. No, sir; as far as I know, sir.

Q. You never heard him say anything of the kind?

A. No, sir.

Q. Did you hear John Andersen complain that the mate had said anything unkind to him that morning?

A. He said it in the boat.

Q. Who said it in the boat?

131 A. Andersen said it in the boat. He said he asked the mate for protection and the mate told him he would get killed anyway.

Q. But you didn't hear the mate tell him that?

A. I didn't hear the mate say that.

Q. That is what Andersen said in the boat when you were going ashore?

A. Yes, sir.

Recross-examined by Mr. MCINTOSH:

Q. You were at the wheel?

A. I was to the wheel; yes, sir.

Q. And Lind has said in his testimony that this happened at the galley.

A. Yes, sir.

Q. Now how far is the galley from the wheel?

A. I guess about fifty yards.

Q. You don't mean fifty yards.

A. Twenty yards.

Q. Point it out on that picture.

A. There is the wheelhouse and there is the galley there.

132 Q. How far is it from that point [wheelhouse] to that point [galley]? You were right in there [wheelhouse], as I understand it?

A. Yes, sir.

Q. And this happened there [at the galley]?

A. Yes, sir.

Q. Well, how far is it from that point [wheelhouse] to that point [galley]?

A. I can't tell you; I guess about sixty feet.

Q. You say after he got into the boat Andersen did relate that story about having appealed to the mate for protection, and the mate said, "G—d d—n you, you will get killed anyhow"?

A. Yes; he said that.

By Mr. WHITE:

Q. Who told you what to tell if you were picked up?

A. He said that in the boat.

Q. Did he not, in the boat, tell you what you should say if you were picked up?

A. Yes, sir.

Q. What did he say then?

Objected to by counsel for accused and withdrawn.

Q. Another question I don't think I asked you yesterday.

133 How far was the cook standing from the mate when he shot the mate?

A. Let me see [examining the painting], about twelve feet—ten or twelve feet.

Q. The cook was standing on the forecastle house and the mate was standing down on the forecastle head?

A. Yes, sir.

MARTIN BARSTAD, again recalled:

Explained that Andersen's name was spelled A-n-d-e-r-s-o-n in Swedish and A-n-d-e-r-s-e-n in Norwegian.

The district attorney here stated that his purpose in making the explanation was to show why the accused was charged under an alias.

The Government here rested its case in chief.

Counsel for the accused here moved the court to instruct the jury to bring in a verdict of not guilty, stating as the ground for such motion that the indictment under which the prisoner is being tried alleges that the mate, Saunders, met his death by drowning, as a result of the casting of his body into the sea, whereas all the proof submitted by the

134 Government was to the effect that he met his death at the hands of John Andersen, and by a pistol discharged by the prisoner, which motion the court overruled, and to which action of the court the prisoner excepted.

Then the prisoner, to maintain the issue on his part, introduced the following testimony:

135 JOHN ANDERSEN, being duly sworn, testified as follows:

By Mr. McINTOSH:

Q. What is your name?
A. John Andersen.
Q. What is your age?
A. Twenty-seven, going on twenty-eight, sir.
Q. Of what country are you a native?
A. Sweden, sir.
Q. How long have you been in America?
A. I came here when I was going on fourteen.
Q. You came here when you were going on fourteen?
A. Yes, sir.
Q. Where did you live when you first came to America; with whom did you live?
A. I lived with Captain Fulkingham, in Johnsport.
Q. Where is that?
A. Down in the State of Maine, sir.
Q. Did you then begin to follow the water for a living?
A. No, sir; I made my first voyage to sea when I was sixteen years old.
Q. You made your first voyage to sea when you were sixteen years old?
A. Yes, sir.
136 Q. That was before you came to America?
A. I came to America in a ship, a Norwegian ship.
Q. You came to America in a Norwegian ship?
Q. Yes, sir.
Q. Did you come as a passenger?
A. As a boy.
Q. Then you came to America—what part?
A. To St. Johns.
Q. To St. Johns, New Brunswick?
A. Yes, sir.
Q. Did you go to St. Johns, New Brunswick, in a boat, as a boy?
A. Yes, sir; I shipped with Captain Fulkingham.
Q. In an American schooner?
A. An American shooner.
Q. In what capacity?
A. As seaman.
Q. You shipped as ordinary seaman?
A. Yes, sir.
Q. How many ships had you been in before you were in the "Olive Pecker;" do you happen to know?
A. No, sir; I don't know. I been off and on to sea, sir, since I was sixteen years old.

137 Q. And in the capacity generally as cook?

A. Yes, sir. I started to cook when I was seventeen years old.

Q. Now, will you please state to the jury when you shipped on the "Olive Pecker?"

A. On the 16th day of June.

Q. On the 16th day of June?

A. Yes, sir.

Q. Now, I want to ask this question to the witness: I want you to detail, with truth, to the jury everything that occurred in reference to this business, from the time you shipped on the 16th day of June until you left the vessel on the 6th day of August?

(Objected to by the attorney for the United States as irrelevant, and on the ground that the Government was confined in its testimony to what occurred on the day of the alleged homicide, and that the accused should be required to conform to the same ruling of the court.)

After argument by counsel, the court ruled as follows:

Judge GOFF. I have no objection to your having the accused commence in his own way and detail as to him is best, confining him-

138 self to the truth, just what took place there on the morning of that day, and without any assistance from you, but I can not permit him to detail to the jury the incidents of the voyage from the time they left Boston in June, as I understand your question to indicate.

(Excepted to by accused.)

Mr. MCINTOSH. There were a great many incidents——

Mr. WHITE. I object to his alluding to that in the presence of the jury, but I have no objection to the jury being retired and letting Mr. McIntosh state all he expects to prove, because your honor would see then how totally immaterial it is.

The COURT. I have refused to permit the witness to answer a question that asks him to detail what we may call the incidents of the voyage from June down to August.

Q. Did you ship on the "Olive Pecker?"

A. Yes, sir.

Q. Did you have trouble with the captain?

(Objected to by Mr. White, counsel for the United States, as irrelevant and as not being confined to the occurrences of the day on which the crime is alleged to have been committed.)

The COURT. I must say, Mr. McIntosh, that I fail to see the pertinency of testimony as to a quarrel with the captain in June or in July.

139 Suppose the mate was a party, the charge is that of killing Saunders in August and the testimony must be confined to that time. You can show, if you can, what was the feeling between the accused and the mate, and that it was such growing out of previous quarrels or threats by the mate to take the life of the accused, or anything in that line which would tend to explain the standing of the parties at the time of this occurrence. Now, anything that bears upon what had taken place, so far as the mate is concerned, can go before this jury.

(Excepted to by accused.)

Mr. MCINTOSH. That was my object, your honor——

Mr. WHITE. I object to his making that statement in the presence of the jury. I must insist, if your honor please, that if there is going to be an argument the jury must retire.

The COURT. We will proceed now by interrogatory.

Q. You shipped on board the "Olive Pecker" some time in June, 1897?

A. Yes, sir.

Q. Now state to the jury all that occurred between you and the mate during that time, including all the facts and circumstances attending the 6th of August.

Mr. WHITE. I object to all that part of the question intended to
140 elicit what occurred between the mate *from* and the cook from the time they left Boston.

The COURT. The trouble, Mr. McIntosh, is this, in the present condition of the testimony of this witness it is hard to see the pertinency of it now, but I do not say that it may not be pertinent. You had better first let the witness detail the transactions of the 6th of August, and if anything is developed thereby which makes it proper to bring in previous incidents as tending to explain what took place on the 6th it can come in.

(Counsel for accused notes an exception.)

Q. Detail to the court and jury all the occurrences which took place on the morning of the 6th of August, 1897.

(NOTE.—This space is due to the fact that the narrative, beginning with the answer to this question, was transcribed before the foregoing.)

C. L. MARSILLIOT, *Stenographer.*

141 A. It was just after breakfast, and the dog was standing at the galley door. He used to keep himself around there all the time. The captain didn't want him to stay at the galley door, and I took some water I had left in a bucket, some dirty water, to throw it onto the dog, as I always used to throw some water on him, and he used to run and holler. I took the bucket, and there was a little water left at the bottom of it. He was standing right at the door and I had been giving him his breakfast. As the dog turned the bucket slipped in my hand. I had the handle on the edge of it, and it hit him him here in the leg, and he ran up on deck and made a noise. I was looking around there for some place to run into and hide, as the captain was coming down there into the galley, and I was standing in the middle of the floor of the galley, facing the galley dresser. He struck me in the side here, and that sent me right on top the red-hot stove, on top the pots and pans. He commenced to curse me and threaten me and everything, and I pleaded to him.
142 I says, "Captain, don't hurt me; don't hurt me, Captain." He looked at the axe, and he looked up through the slide. There is a little slide in the galley. He saw John Lind standing on top there, and he looked at me; he says, "You whore's son," he says, "I will have the heart out of you." And there he left me standing. I had cut them two fingers into my knuckles. The mate came along, and it was my last hopes in that vessel to see maybe another day; I had been sleeping in the galley for a week; I didn't know whether I would live to see the next day or not, so I turned to the mate, with tears rolling down my cheeks, and I said to him, "Mr. Saunders," I says, "won't you protect me until we get into port?" He turned around to me with scorn. He says, "Go to hell," he says, "you will get killed anyhow." Then I did not know what I was doing. My mind was in that condition I didn't know whether

to run overboard or to stay there and go and hide; I didn't know what to do. So I went up in the galley slide and looked around to see if I could see any vessel. Then I made up my mind if I should see any vessel I should take a board and jump overboard. So there I was. My basket of dishes was standing upon the dresser, all dirty, after breakfast, and I was washing them, and I saw at the time it was twenty-five minutes to ten then. I looked around, and I didn't know if I had washed my
143 dishes at all. Of course I was completely out of my head then, so I thought about the cabin. Now, I used to sweep that cabin every morning and dust it and everything before nine o'clock. I used to have my dishes done in the galley before this time, and I had my dinner to have ready before twelve o'clock. So I started into the cabin, thinking that the captain would be on deck, and I came down in the cabin. He was sitting inside of the door in a chair like this, although bigger, and he had a bottle on this here lounge which was alongside of the stool or the chair. He glared at me and he looked fairly black in the face with rage. He blurted out and cursed me when I came into the cabin. Well, I didn't know what to do. If I should run on deck, I would have to run overboard; that was the only way I have to see out of it. I commenced sweeping the cabin and started into the mate's room first. I saw the mate's gun lying on the shelf, and I took that down, thinking if worst come to worst, I will have to defend myself. So I finished the cabin and started into the captain's room. I passed by him in that direction [indicating by gesture], and he took up that bottle like this. He says, "You whore's son!" Then he took it up like this as if to split my head open, when I pulled my gun out and fired. The bullet struck him in the left temple. He fell into the chair, and I ran
144 into the captain's room. Then I thought about the mate. I ran into the captain's room then and got his two guns. He used to keep one gun in under the pillow and one on the shelf. I ran up on deck and I didn't know where the mate was then. I came up to John Lind and he was at the main rigging. I says, "Where is the mate?" He says, "He is aloft." I looked up there, and I think I said something of calling him down, but I don't think I did do that. The mate came down, and before he came down to the , piece next to the rail, he says, "Where in the h——l did you get them guns?" He says, "And where is the captain?" I never made no answer to him, but I stayed on top that house there as the mate came down, and he had this marlin spike around his neck. I will just show you how he had it, if you please. He had this hitch on this marlin spike, as represented to you before. He came down like this and walked up like this [indicating by appropriate gestures] (walking towards the bowsprit) and turned in this direction (to the right) and came towards me in that direction (on the starboard side). He took the half hitch out of the marlin spike like this, and the marlin spike was hanging down when he came towards me. I was standing there and had the guns then. I had three of them and I held them in my hand all the time. I
145 had an apron around my waist, and I had no pockets here in the pants. He got this hitch off the marlin spike and came around to me like this [indicating by proper gesture] to take the marlin spike off his neck and shove the marlin spike into me. I pulled the gun and shot

him. The first shot struck him here somewheres (in the side). He was still coming towards me, and I shot twice or three times altogether, when the man fell dead. In the meantime John Lind has been running into the lee side of the house. Now, he stated here yesterday to you gentlemen that I came up to him and says, "Now the mate will go, too." But that belongs on the lee side of the house; to that man. When he came there he told them, "Now the mate will go, too."

Q. You mean by that that you didn't say it at all?

A. No, sir. That belongs to John Lind and into the lee side of the forecastle; that is where that belongs. So I stood there, and John Lind—he was the man that came up first, and there was nobody else came up—so I says, "Men," I says, "ain't you coming up?" I says. In the condition I felt, I felt actually frightened of the men the way I was, because I was completely gone. We throwed the mate overboard. I helped them also, so far as I can remember. And we took the captain
146 out of the cabin and threw him overboard. And now, when this was done, I told them, I says, "Now men," I says, "you can do as you like with me," I says; "you can put me in irons and take me into port and give me up. You see I had to defend my own life." "Yes," they says, "we all know that." There I was, broke down completely, like a child, and here they are, coming up here yesterday to put everything onto me. I can prove I was not all over the vessel, as I was put here by Mr. White yesterday. We were around the vessel a little while, and *and* me and John Lind started down into the cabin with the intention then of taking the vessel into port. We went into the captain's room and got the chart out, and we had that on the forward cabin table, looking at the chart to see where we could make port possibly. In the meantime this Martin Barstad came down from the wheel into the cabin, and this William Horsburgh and March came down into the cabin. Well, they say that I gave them a drink, as I believe myself, if they say so—of course I am accused of that—but I don't know that such a thing as that was into my mind then, or that way. So I gave them a drink, so far as I can remember. The bottle was taken out of the room, and this Martin Barstad, anyhow, before the vessel was left, he was drunk, and they all had drinks, more or less, all of them excepting the engineer. He did not drink any whiskey that I know of. We were around
147 there that way. When we came into the forward cabin then the slop chest was pulled out. This Martin Barstad 'hen he came down in the cabin says, "Where is the slop chest, Steward?" I says, "Over in that corner," and I paid my attention to John Lind. I was showing him then the long dagger that the captain had alongside of his berth all the time, one thing and another. This here March, Andrew March, he was into the staterooms pulling out everything onto the floor, and this engineer, William Horsburgh, was also pulling out everything. We came out into the forward cabin, and there was the cabin turned upside down of everything, so I turned to the men, "Men," I says, "this vessel isn't to be robbed. Those men," I says, "wasn't killed to rob this vessel." The Spaniard told me, he says, "Yes, Steward," he says, "that is right." That was the condition that was going around. So they started up on deck to do something. The wheel was left then; nobody at the wheel. They started up on deck and I went into the wheel-

house to put the vessel up. She had been kept off then, as nobody had been looking after the wheel. Then they were going to sink the ship and everything else, and it appeared to me as seems as if they did not care what they done. The only one man among the whole five of
148 them that tried to comfort me in the condition I was was the Spaniard, and that was the time he said they wouldn't put me in irons. He had me around the neck and patting me like a child. I says, "Come, men," and I told him, I says, "We will see what we are going to do," as it appeared exactly to me the same as if they were going to take charge of the vessel and do what they liked 'ith her, without trying to do what was right or anything else. I called him aft, and I says, "What will we do?" None of them knew exactly what to do. This big Andrew March here, he says, "Let us take her to Africa." John Lind, he says, "Let us take her back to the States." Barrial, he says, "Let us try to get her into port," and this here William Horsburgh says, "No," he says, "we will set fire to her and take the boat and try to get ashore. That will be more safety." I told Horsburgh, "I will see if they are willing to do it." I took Barrial on the lee side of the pilot house and I says, "What do you think we had better do?" He was frightened. "I don't know," he says, "what we will do." I told him about this, and I asked him further things about coming ashore and everything. He said it was all right. So I went and asked John Lind and I told him about this. He says to me, he says, "Is the rest of them willing?" "So far as I know," I says. Then this here Andrew March, he was standing up on the deck
149 load somewheres about here [indicating on the painting], and the engineer was there and I was there. So I says to the engineer, "Go see if Andrew is willing," so he went and said something to Andrew. What he said to Andrew I do not know. As he stated here yesterday, he went up forward and told him, "Be careful what you say to the cook." In the meantime those guns I had—after that was proposed I threw the two guns overboard, because I had no use for them, and I kept one. Here they said yesterday that I went down in the cabin and loaded those guns up there. Where did the cartridges come from that loaded the mate's gun up? This gun I had belonged to the captain. I couldn't open that and I asked the engineer, Horsburgh, in the boat, after I had fired those three shots as they accused me of doing, if he can open the gun, and he took and opened it and we came ashore. Then they accused me of firing three shots from the gun which I had. I did, but it was a long ways away from them. We had the dog—it was a long ways. I told John Lind I was going to run back and ask the engineer if he can open this gun. He says, "You can't catch them; I will try and open it myself," and he tried it and I tried it, and I couldn't get it open. I took a stone and knocked on it, and if the gun is in court here it can be
150 seen where the gun has been knocked with a stone to try and get it open. Now, the firing of the vessel, I went down into the cabin to get some stores out and Martin Barstad was down in the cabin with me, handing the stuff up, and the stores was put into the boat before we lowered the boat. We lowered the boat with the Spaniard into the boat. Meantime this here engineer and Andrew March went down there into the storeroom and broke out the kerosene barrel and

scattered that over. Then he came up to me and he says, "Steward, what will we do with the water?" "We have got enough water." I told him, "Isn't that cask" (a little molasses cask I had there) "big enough to hold water for us men?" He says, "I don't know," he says. Then he came and he told me about this beer barrel. "Will we take that into the boat?" he says. "I don't know," I says. "We might run short of water," he says. "Well, I don't care," I says. Then he and Andrew March took this beer barrel up and put it out on the deck-load. Me and John Lind, we hauled the boat up alongside the vessel and the engineer jumped down into the boat and me and John Lind was sending the bottles down into the boat out of this barrel. After these bottles went down into the boat the engineer came on deck and John Lind went to take the boat astern on this lee side here. I went up on the weather side and helped him to haul her with the painter while they bent another
151 rope to it. He was going to give the boat a long painter. In the meantime this engineer has been around. Of course, I don't know; I couldn't keep my eye on all of them; that is impossible; but Andrew March was forward, and this Martin Barstad, and that left me and John Lind and Barrial together. So I went forward and I left John Lind there aft. I says, "I am going to get Martin Barstad," as he was then drunk and staggered around the decks. I went forward and hollered to Martin Barstad to get into the boat. I gone forward and I see this Andrew March, with some rags saturated with kerosene, down there setting fire to her. Then I hollered to Barstad to get into the boat. I went aft and the engineer was then down in this lazarette hatch, and he been h'aving straw out of the wheelbarrow and putting it into the hatch, and as I passed him I heard him say, "I will make her burn," he says. So I went aft and hauled the boat up and John Lind got into the boat. John Lind was holding the boat up until I got into the boat. I think Andrew March was the next man to get into the boat, and the engineer was the next to him, and Martin Barstad came the last. So then we had the mast and the sail into the boat, and everything, and we cut loose from the vessel. She was then afire. We had a compass in the boat and we steered the best we know for land. The Spaniard he
152 took the tiller first and steered, and I relieved him when night came. Now, Martin kept himself drunk into the boat; John Lind was drunk into the boat; the engineer carried on something ridiculous in the boat, and left just me and the Spaniard there to take care of them. Then they refused to bail the boat, when it took two men to keep the boat free of water; they couldn't get Martin Barstad to bail the boat. So we came late at night and I went and fired three shots. My intentions was not to do anything wrong with it, only to wake him up. That was all. I had no more intention of anything, as they came up here and said I said, "American style." Well, they might have said it was "American style," but not me. So we saw a steamer way late in the night. Now, they kind of got frightened because it was blowing hard, and it was all we could do to keep that boat before the wind and hanging onto the sheet and the tiller. Me and the Spaniard steered the boat all the time. We took turn about, as he was the only sober man into the boat.

By a JUROR:

Q. The Spaniard was the only sober one?

A. Yes, sir, and me. And we saw the steamer's light. The Spaniard he saw it first. "Here is a boat," he says. He had the tiller
153 and was steering right ahead of that steamer in the dark night; we could see nothing. I took the tiller and I says, "Keep her off; don't let that steamer run into us," I says, "whatever you do." Then we seen another steamer through the night and the next day we seen a bark, or it was a barkentine, I don't know which. It was no land to be seen or anything, and then they commenced to get up stories to say if anybody picked them up. Those men stated here that I come up with them stories to say if we were picked up that the captain and mate was burnt in the vessel and the vessel caught fire. Those were the yarns that they were made up to say, but I answered that if I couldn't come with the truth, as the thing was, I couldn't come with anything else, as I knew perfectly well the way things was going on board that vessel. The whole United States Government knows that captain and mate. Then we got to the beach before dark—well, it was not quite dark; I know it was after sunset. Then everything we had was all wringing wet, and we took the boat sail out of the boat and the boom and gaff and made a tent, and we stopped there until the next morning. Then it was four Brazilians passed us that morning. Then they been taking the beer bottles ashore, too, with them. Then the Spaniard, he says, "We better get away from here so quick as we can," he says. I never said anything to him. They all wanted to separate
154 somehow. I told them, I says, "No; we will all go together." And the Spaniard, he says, "No," he says, "before we do that," he says, "I will go alone." So did William Horsburgh. He says, "Before we do that I will go alone," that way. "Well," I says, "I am not going alone; I will go with somebody else." So I suggested to the Spaniard, I says, "We will draw lots and see who will go together." The Spaniard, he got some matches and put them in between his fingers. We drew lots, and the lot fell on me and John Lind, and we went together. We started in a northerly direction, and the dog was with us, too, as you heard them telling you yesterday that I shot the dog. Now, the dog came with us, and the dog has been having fits aboard the vessel before, and he took fits after we come ashore. He took fits before we left one another in the morning. So me and John Lind started up to the northward direction with the dog, and we got up to a point, and it was a little river. We couldn't cross it unless we go up in the country, so we sat down there, and the dog he commenced having fits. Then John Lind had a gun this time of his own; the consul in Bahia bought it to send it here for evidence, but if it is here, that I don't know. So I says to John, I says, "You go and shoot that dog, won't you, John?" He went and shot him, but he didn't shoot him right, and I went and helped to
155 put the dog out of misery, as he was running out around the bushes. So I started on and I felt bad, and I says to John, "Let us go and catch those other fellows," I says, "and we will go and give ourselves up," like that. "O," he says, "we can't catch them," like that. So I started off, and we came to a little village. I don't know the name of it, or anything.

We got some information that we wasn't far from Belmont. We walked that day till late at night. Then we came to a little hut on the shore, and nobody into it, built of palms leaves, and we stayed there that night. The next morning we started early again, and we came into this Belmont way in the afternoon. Then I says to John Lind, "Now, John, I am not going to go any farther," I says, like that. I says, "I am going to see if there is an American consul here," like that. He did not say anything to that, so I went and inquired if there was an American consul in that place. They says, "No;" and we found that out, anyway; and we met up to a gentleman there who could speak English; he was a German. I told him about this, and he asked us where we came from. I told him that we were shipwrecked sailors. He asked how many of us was there. I told him the crew, and I told him four men was lost and only me and John Lind got ashore out of the boat. The reason I had of saying
156 that to him was because when there was no American consul there I didn't feel like getting arrested before I could see the American consul. So he says he will give us a pass on to Bahia in one of his small vessels. We accepted that and got into Bahia. I had a little bundle. They all had clothes when they came ashore. I had some of my own clothes, as I had plenty of my own clothes. I had a little satchel, and I threw that away, and John Lind threw his clothes away, with the intention then of going up to the American consul. So when we came into Bahia it was early in the morning, and I asked John, I says, "What will we do now? We will go right up toe the consul." I didn't know any different then, and a colored man came up and he says, "Are you fellows sailors?" John Lind says, "Yes." He says, "Do you want to ship?" He didn't know what to do, and he answered him, "Yes," or something like that, you know. We was standing there and I says, "Well, we will go and give ourselves up, won't we?" He says, "Before I will do that I will take to the country." I says, "How is that?" I says. "Well, they will not catch those other fellows, and they will lay it all to me." So then we went around to the consuls. We went around to the German consul's first one, and we came into the Norwegian consul. That was in the morning and afternoon. A captain came in there and wanted one man to go to Pensacola on this Norwegian
157 ship. Her name was the "Bernadotte." We was both standing there, me and John Lind, and the captain looked to me and he asked me if I wanted to go. I told him yes. That was in the afternoon, and I went on board and went to work. The next afternoon the police boat came after us. Then I know that we was arrested; and John Lind was also arrested aboard of the Brazilian brig that he had shipped aboard. I says to John, "Now we will go and tell the truth, same as the thing is." "Well," he says, "all right;" and we came up to the court-house, or whatever it might be, and I asked him, I says, "Who is it has arrested us?" He says, "The Norwegian consul and the Brazilian authorities." So we stayed around there and was put into a station house until the next morning. I wrote up for the American consul to come down, and he did not come that day, but we was put up into the jail and put into a dungeon and kept there twenty-four hours. Then the American consul sent up a clerk there, and that was the first thing he knew about the transaction, the American consul. So then we was put

into jail. I told them, as I stated to you here, I am here accused of killing the mate and captain. I told them I did that in defending my own life, and gave them the statements. He came up there and took our statements, and I told him everything how it happened, and so
158 did John Lind. He sent in his statements, and we was there in jail a week before the others came. They came to a place, as they mentioned it yesterday, I forget the name of it, close to Bahia; and then they found out that me and John Lind was arrested, as it was in the Brazilian papers. When they came into jail there with us, I says to the Spaniard, "What made you give yourself up?" "The boat gave us away," he says. The boat was left on the beach. He was around there in a terrible state. He says, "I wish I had the smallpox; I wish I had the fever and die. Ther' is no hopes now," he says. I says, "Don't say that. Tell the truth," I says; "you can't do no more." Well, he didn't say anything to me, so I went up to Martin Barstad. "Martin," I says, "tell the truth, won't you?" "O," he says, "I am not going to swear myself to hell for nobody." He said that to me. I said, "I don't ask you to do that," I says; "I ask you to tell the truth." Then he came accusing me that I made them burn the vessel. I says, "Did I make you burn the vessel?" "Yes, you did," he says. "Did I make you open the slop chest?" "Yes, you did." "Did I make you drunk, too?" "Yes, you did." So I have it all. That is all that I have to say. In God is my trust.

Q. Now state what trouble, if any, you had had with this mate previous to this occasion?

159 Question objected to by Mr. White, United States attorney, on the ground that the testimony of witness should be confined to what occurred on the day of the alleged homicide.

After hearing counsel for both the Government and the accused, the court ruled as follows, Hon. Nathan Goff, circuit judge, rendering the opinion:

"The reason I suggested to counsel for the accused that the statement as to the occurrences relating to the killing of the mate should be stated as they took place on that day was that the testimony might be confined to a certain limit. Now, there is no doubt in the world that a party may protect his own life against the party assailing him. If he believes that he is about to suffer harm from one who has attacked; if he bases that belief upon a previous threat; if he bases that upon previous personal encounters; if he bases that upon the known brutal character of the party, the law, out of tender consideration for the frailties of human nature, will permit him to act upon that belief and upon that understanding. But can we apply that in this case? Now, we must look at the matter as it is before the jury, as it is presented by this witness.

160 The witness states that he had a controversey with the captain; that the captain was cruel to him; then, in that hour, he turned to the mate and advised with the mate; he asked the protection of the mate. His conduct, at least, does not indicate that there was any feeling between him and the mate at that time. If the testimony is admissible, it is upon the theory that it must tend to explain the situation as it then existed. He had turned to the mate to ask his protection

from the captain. Now, if the mate had attacked him, it would be perfectly competent for Andersen to show that the mate, previous to this day, had threatened him or had been cruel to him. We must look at the testimony as the witness has given it himself. It was the witness who sought the mate, and not the mate who sought the witness. I fail to see how a party can, under those circumstances, show, either by himself or by another, that he had had a controversey with the party he is about to attack, the day before or the week before, if he has had time to cool. If there had been a controversey of that kind, even under any circumstances of that kind, it does not authorize the party to take the law into his own hands. I must exclude the testimony and adhere to the intimation I gave some time ago, on another ruling, with reference to threats."

To which ruling the prisoner, by his counsel, excepted.

161 Mr. McINTOSH. Now, in order that this matter may go down right, and in order that I may save the point, but without any disrespect to the court, I want to propound this question to the witness.

Q. I don't want you to answer this, Andersen, until the court passes upon it. I want it to go down in the record. I want to ask you whether on the day before you had had a difficulty with the mate, and, without provocation on your part, the mate had not attempted to throw you overboard?

Mr. McINTOSH. I understand that your honor rules that I can not ask that?

The COURT. The question is improper and can not be answered.

(To which ruling the prisoner excepted.)

Q. Andersen, did this mate attack you with that marlin spike on this morning?

A. He came towards me as if to shove it into me.

Q. He came towards you?

A. Yes, sir.

Q. You say he first walked away from you and then turned around and took the marlin spike like he was going to shove it into you?

A. Yes, sir; and I was standing up on the house.

162 Q. And he was advancing towards you?

A. Yes, sir; towards me.

By the COURT:

Q. How close was he to you when you shot him?

A. Very close up, sir.

Q. Represent the distance by that table and yourself.

A. He was up to here (about four feet).

Q. Close up to you?

A. Yes. Then I had three guns in my hands, and I picked one of them out and fired.

Q. Could you touch him with the pistol?

A. No, sir.

163 Cross-examination by Mr. WHITE:

Q. You said, Anderson, that you were about three feet from Mate Saunders when you shot him. Is that true?

A. Yes, sir; about that.

Q. You have stated that you were standing on the deck load?

A. No, sir; on the house.

Q. Did you not make a statement in the presence of Mr. Ackiss, the clerk, and Mr. Marsilliot, the stenographer who sat here this morning, on the eighth of last November, in which you stated that you were standing on the deck load when you shot the mate?

A. No, sir; I stood on the forecastle house.

Q. I asked you if you did not on that occasion, and to those gentlemen, make the statement that you stood on the deck load. Do you say you did or did not?

A. I did not. I stood on the house, because I couldn't have shot the mate from the deck load that was on the vessel.

164 Q. Did you say to these gentlemen on that occasion, "I stood there on the deck load, and he took a marlin spike he had on his neck like this; he came at me with a marlin spike, and when I pointed the gun at him he said, 'Don't shoot,' or something like that?" Did you make that statement to those gentlemen on that occasion?

A. In Bahia?

Q. No, sir; here in Norfolk.

A. Yes; but I was standing on the forward house, not on the deck load.

Q. You change your statement now and say you were standing on the forward house and not on the deck load?

Mr. McIntosh. The witness doesn't say so.

Mr. White. I ask you—and if you do not understand me, say so—whether you did not state on the eighth of last November to Mr. Ackiss, the gentleman who sits here, and to Mr. Marsilliott, the gentleman who sat here this morning, this: "I stood there on the deck load, and he took a marlin spike he had on his neck like this; he came at me with a marlin spike, and when I pointed the gun at him he said, 'Don't shoot,' or something like that?" Did you say that or not?

A. I did say the latter, sir; but I might have been mistaken about the deck load and the house, as I was not on the deck load; I was on the front part of the house—on the forecastle.

Q. Where was the mate standing when you shot him?

A. He came towards me.

165 Q. I didn't ask how he came. Was he standing on the top of the same house you were standing on?

A. No, sir.

Q. Or down here on the head of the forecastle?

A. Yes, sir.

Q. He was down here on the head of the forecastle?

A. Yes, sir.

Q. Well, he was below you, then?

A. Yes, sir.

Q. How much below you?

A. About so high as this—not quite so high as this chair here with the level of the forecastle.

Q. As much as two feet?

A. I don't know the dimensions of the vessel, so I can't state that exactly; but it isn't high; it is a very little step on top of the forecastle.

Q. You think it was as high as that chair, at all events?

A. No, sir; not quite as high as that, I don't think.

Q. He didn't step up on top the forecastle house where you were standing?

A. No, sir; but he was coming towards me, and did this way.

Q. When you first saw him, whereabouts in the rigging was he?

A. He was coming down—coming down from there.

Q. Coming down from the crosstress of the foremast?

A. Yes, sir.

166 Q. When he got down, on what part of the vessel did he stand?

A. He came to about there (pointing to picture of ship); then he says, "Where in the hell did you get them guns, and where's the captain," he says. I didn't make no answer to him and I was up on the house then at the time, and he walked in this direction away from me like he was getting the spike and the hitch off the spike, and then he turned again and came towards me with the spike.

Q. How far did he go forward before he started to turn around?

A. He went to the forward of the capstan.

Q. Where is the capstan?

A. It is supposed to be there (pointing).

Q. Isn't it there (pointing)?

A. It is further up; the capstan on the vessel doesn't belong down there, it belongs up here.

Q. Does the forward house come up against the forecastle head or deck?

A. Yes, sir; the forecastle deck.

Q. There is no space between the forecastle deck and the forward house?

A. No, sir.

Q. And you were standing up on the forecastle house and he was down on the forecastle head when you shot him?

A. Yes, sir.

167 Q. Andersen, you were cook on the "Olive Pecker?"

A. Yes. sir.

Q. What were your duties as cook besides cooking?

A. My duties is to keep the cabin clean and cook for the sailors and look after the captain.

Q. Your duties were to wait on the captain?

A. Not to wait on him exactly—to look out for his interests and look out for all the stores.

Q. To cook for the sailors, clean the captain's quarters, look out for his interests and the stores, and to cook for the officers.

A. Yes, sir.

Q. Where was your room on board that ship?

A. It was on the starboard side.

Q. Were your quarters in the forecastle house or in the after cabin?

A. In the after cabin.

Q. Point out in the after cabin where your quarters were.

A. That's my room.

Q. Your room was between the room marked as a spare room and the room occupied by the engineer?

A. Yes, sir.

Q. And opened into the forward cabin?

A. Yes, sir.

Q. Anderson, you have stated that on the morning of the sixth of August you had a difficulty with Captain Whitman.

168 A. Yes, sir.

Q. And it grew out of the fact that you threw water on his dog?

A. Yes, sir.

Q. Did you say or do you say now it was cold or hot water you threw on him?

A. It was cold water, sir.

Q. Did or did not Captain Whitman say it was hot water?

A. Yes, sir.

Q. Before he struck you or hit you didn't he go and feel the back of the dog?

A. No, sir.

Q. You are positive of that?

A. Yes, sir.

Q. He didn't go first and feel the back of the dog?

A. No, sir.

Q. He struck you at once, you say?

A. He struck me in the side and sent me on top the red-hot stove among the pans and pots.

Q. He didn't tell you you lied?

A. Yes, sir.

Q. What did he tell you you lied about?

A. He told me I threw hot water on the dog, and I told him, "Captain," I didn't throw hot water on the dog, and he says "You are a lying son of a whore," and then struck me.

Q. But he did not feel the back of the dog?

169 A. After that he went out of the house, and the dog was on top the house——

Q. He felt of the dog's back after you were struck?

A. Yes, sir.

Q. That was, you say, about what time in the day?

A. That was about, I should think, half past eight in the morning—after eight, anyway.

Q. And you say you were very much disturbed in mind, and that you went about your work in the galley?

A. Yes, sir.

Q. And at half past or twenty-five minutes after ten——

A. No, sir; it was twenty-five minutes to ten when I went to work.

Q. I thought you said twenty-five after ten. At twenty-five minutes to ten you looked and saw the time and said to yourself the cabin had not been cleaned up?

A. Yes, sir.

Q. How did you enter the cabin?

A. In through this forward companion way.

Q. In through this forward companion way from the galley door?
A. Yes, sir.
Q. And when you entered the cabin what room did you first enter?
A. Into this one [pointing to diagram].
Q. The forward cabin?
A. Yes, sir.
170 Q. Was the captain sitting there?
A. No, sir; he was here at this door in the big chair.
Q. He was in the after cabin?
A. Yes, sir.
Q. Whereabouts?
A. Sitting alongside this here—this sofa.
Q. On the right or starboard side of the vessel?
A. On the starboard side of the vessel.
Q. Which is the right side?
A. Which is the right; yes, sir.
Q. And just about here, you say [pointing], in the chair?
A. Yes, sir; just about here.
Q. You say when you entered he looked black at you?
A. Yes, sir; he glared at me.
Q. You entered by which door into the forward cabin?
A. By the forward companion way.
Q. Right here?
A. Yes, sir.
Q. When you first entered where did you go?
A. I went first into the pantry.
Q. Where is the pantry?
A. Here is the pantry [pointing to diagram].
Q. Was it from the pantry you saw him looking black at you?
A. As I was coming through this door and coming here I looked at him and he cursed me.
171 Q. Please say how you could see the captain, entering here and coming there, if he was sitting there?
A. When I came here and came through here I saw him sitting here.
Q. You said you came and entered the pantry?
A. Yes, sir; but I came here when the captain saw me and commenced to curse me.
Q. Where were you in the forward cabin when you saw the captain looking black at you?
A. About here.
Q. And where was he sitting, you say?
A. In this chair here.
Q. Right there next to that sofa?
A. Yes, sir.
Q. How was he facing?
A. Facing me, sir; facing forward.
Q. Now, then, what did you do when you went in the pantry?
A. Got my dust broom and dust pan.
Q. Where did you go then?
A. Then I started to sweep the cabin.
Q. What cabin; forward or aft?

A. The forward cabin.
Q. Did you sweep it?
A. Yes, sir. I commenced the mate's room first.
Q. Then you did not commence the cabin; you commenced the mate's room first?
172 A. Yes, sir; because I always sweep from the window.
Q. Then, after going in the forward cabin, you went in the pantry and got your dust broom and pan and went in the mate's room?
A. Yes, sir.
Q. Could you see the captain where he sat in the after cabin from where you were sweeping?
A. No, sir.
Q. You did not see him there?
A. No, sir.
Q. You said while you were sweeping in the mate's room you took the mate's pistol?
A. Yes, sir.
Q. You have made other statements about how you got that pistol, did you?
A. Yes, sir; I did, in Bahia.
Q. Didn't you tell the consul at Bahia that you got your pistol out of your own trunk?
A. Yes, sir.
Q. Was that true?
A. It was not.
Q. Why did you tell him so?
A. I didn't know what to say.
Q. Didn't you tell him that in a written statement that you wrote yourself?
172½ A. Yes, sir; but that was with the intention of bringing it to my counsel when I got home.
Q. You wrote out a statement before you saw the American consul?
A. No, sir.
Q. Did you not?
A. No, sir.
Q. You wrote out a statement after you saw the American consul?
A. Yes, sir.
Q. In your own handwriting?
A. Yes, sir; with a lead pencil.
Q. In that statement you said you got the pistol you killed the captain with out of your trunk?
A. Yes, sir.
Q. And that was not true?
A. That was not true.
Q. But you say you intended that statement for your counsel?
A. Yes, sir.
173 Q. You mean your counsel when you got back to this country?
A. When I got home.
Q. Did you want to deceive your counsel?
A. No, sir; I wanted to show the counsel how it was; that is, the people were coming here to put me down, and I wrote the statement to

show the thing in the condition it was, and I called for the American consul and the statement before I left Bahia, and they wasn't given to me.

Q. But the fact is, you wrote with your own hand in pencil the statement that you got the pistol you killed the captain with out of your trunk?

A. Yes, sir.

Q. But that was not true?

A. That was not true—yes, sir.

Q. I want you to tell the jury where you got the pistol with which you killed the captain.

A. I got the pistol on a shelf in the mate's room.

Q. And not out of your trunk, as you stated?

A. No, sir.

Q. And in making that statement you got it out of the trunk, you intended that statement for your counsel?

A. Yes, sir. I am sorry I did tell a lie, but I didn't know what to do, as those men were coming in there ready to put me down before everybody.

174 Q. Those men didn't testify when you handed that statement to the consul?

A. Yes, sir; they had been in sending in their statements.

Q. When you wrote out that statement did you not say you couldn't exactly remember anything that happened after you shot the mate? Did you stop right there then?

A. I did that. I stopped at this: "Now, men, you can do as you like with me; put me in irons and take me to port and give me up." I stopped at that, as I didn't want to go to work and expose those men, thinking they would be men enough to come up and tell the truth as it happened.

Q. Then in that statement you did not tell all that happened, but stopped at the point where the mate was shot?

A. Yes, sir.

Q. And did not in that statement say that his body was thrown overboard, did you?

A. I don't remember of saying that.

Q. You did not say in that statement that you gave the men a drink?

A. No, sir; I left all that out.

Q. You said that you stopped there?

A. Yes, sir.

Q. You were subsequently examined before the American consul at Bahia, were you not?

A. Yes, sir, and he wrote that statement.

Q. And he wrote down the statement himself?

175 A. Yes, sir.

Q. And did you then tell where you got the pistol?

A. No, sir; but he simply put down in the statement that I got the gun to protect my life. That's the way he put it down. I saw him put it down.

Q. Didn't he put it down as you said it?

A. Some words he put it down as I said it and other words he used his own.

Q. Didn't you sign that statement?
A. Yes, sir.
Q. Didn't you read t over?
A. Yes, sir.
Q. Didn't you declare you made it of your own accord?
A. Yes, sir.
Q. And spontaneously; that is, without any influence from anybody?
A. Yes, sir.
Q. And in that statement you didn't tell where you got the pistol?
A. No, sir.
Q. Did you not upon arrival at Hampton Roads make a statement to the gentleman who is seated there (pointing) about how you got the pistol? Did you or not?

176 A. That was also taken away from me. That was a full statement of the transaction. That was for my counsel, too, sir; and that gentleman asked me: "Give me your statement, won't you?" I didn't know enough what to do. I gave it to him. He asked for it. I didn't know any better.

Q. Did he not ask you where you got the pistol, and did not you say, "Excuse me, that is for my counsel?"
A. No, sir.
Q. Look at him. Didn't he ask you on the "Lancaster" where you got the pistol, and didn't you say to him, "Excuse me, that is a matter for my counsel?"
A. Yes, sir; that's right, sir; that's right.
Q. You stated in the written statement handed to the consul at Bahia, did you not, that you thought of your gun, and went into your room and got it and put it in your shirt and started in the after cabin?
A. I did say that, but that was a lie.
Q. You stated afterwards to the American consul at Bahia that you laid hold of the revolver that you carried for means of protection in your pocket, and that's all you said to him about where you got the pistol that you shot the captain with?
A. I said something to him. You must excuse me, Mr. White; I was down there in a foreign country; those men told me a good many lies, and I didn't know what I was going to do.

177 Q. You admit yourself that you told a lie, and that justifies me in asking and questioning you closely. Did not you afterwards state, in the presence of Mr. Aekiss here, that you got the pistol with which you shot the captain from the mate's room?
A. Yes, sir.
Q. That you went in to sweep it out and saw it lying on the shelf?
A. Yes, sir.
Q. That you saw him two or three mornings take it out of his pocket and put it on the shelf; it was his gun, and you took it up and put it in your shirt?
A. Yes, sir.
Mr. WHITE [turning to a gentleman]. Mr. Williams, will you stand up? [turning to witness]:
Q. Did not you also, in Hampton Roads, on board the "Lancaster," about the third or fourth of November, make this statement to this gen-

tleman here: "I saw he was in a bad humor and thought he was going to kill me"——

A. That was asked me by a reporter—what I answered him, but I didn't know it was in print in the papers, your honor.

Q. I am not asking what was in the papers. Did not you say to this gentleman, on board the "Lancaster," in Hampton Roads, about the fifth or sixth or seventh of November last, that you saw the captain was in a bad humor and thought he was about to kill you, and knew he
178 had some pistols in his bunk and went to get one of them?

A. No, sir, I didn't say that. I said it in a different way.

Q. Say in what way you did say it.

A. That gentleman—there *was* two or three more reporters in the same smoking room on the "Lancaster;" I was called aft and they asked me how this thing occurred; they didn't ask me anything about the guns; they says, "We know all about where you got the guns;" that's what those gentlemen told me, and I told them I saw the captain was going to split me in the head with a bottle, and previously the mate tried to shove me overboard, and I went to ask the mate for protection after my hopes were gone, and he told me to go to hell; I would get killed anyhow——

Q. We are talking about the pistols now. You say that gentleman is the one who told you they knew about where you got the pistol?

A. Some of them. Whether he was the one or the other two I couldn't say.

Q. But you did not tell him you got the pistols from the captain's bunk?

A. I don't know whether it is that one or the other two.

Q. Did you tell any gentleman on that occasion that you got the pistol out of the captain's bunk?

A. No, sir.

Q. You did not?

A. No, sir.

179 Q. You say the captain was in the after cabin sitting at or near the point——

A. Right here, sir, here is a big chair here.

Q. Right near that sofa?

A. Yes, sir; here is a door here that opens there; it is shut always there.

Q. Anderson, how long were you in the mate's room cleaning it up?

A. Just long enough to sweep it, sir.

Q. And while you were in there you say you took the mate's pistol and put it in your shirt?

A. Yes, sir.

Q. Where did you go when you finished sweeping the mate's room?

A. I finished the forward cabin, sir.

Q. Where was the captain while you were sweeping the forward cabin?

A. He was sitting in that chair.

Q. Still?

A. Yes, sir.

Q. You saw him while you were sweeping the forward cabin?

A. Yes, sir.

Q. Then after doing that where did you go?

A. I finished up my room, sir.
Q. Then where did you go?
A. I started in the after cabin.
180 Q. Did you go in the after cabin?
A. Yes, sir.
Q. By what door did you enter?
A. By this door, sir [pointing to diagram].
Q. By the door on the starboard side of the ship?
A. Yes, sir.
Q. Where was the captain sitting when you entered?
A. In the chair.
Q. Near that sofa?
A. Yes, sir.
Q. What occurred when you entered the room?
A. As I came by here to enter to walk by him, I was carrying the dustpan and the broom in the left hand; as I saw the captain there I knowed or I felt it was my doom, because you will not permit me here in this court to tell the history of the voyage as it will come out.
The COURT. You can tell what took place in that room.
A. He sat there with a beer bottle, and as I passed him he grabbed it and said: "You whore's son." And I thought he was going to split my head open.
Q. (By Mr. WHITE). Did he face you then?
A. Yes, sir; and I pulled the gun and shot him, and he fell back.
Q. Where was the beer bottle?
A. On the sofa. He was sitting there holding it.
Q. Was he sitting there holding it, or was it on the lounge?
181 A. He sat there and holding it in his hand.
Q. He had his hand on the beer bottle when you entered the room?
A. Yes, sir.
Q. Was it in his hand when you shot him?
A. He picked it up, like this, to drive at me.
Q. *How* just said it was in his hand; how can you say——
A. He held it in his hand.
Q. Did he have it in his hand when you entered, or did he pick it up as you entered?
A. He had it all the time. He sat there drinking that beer.
Q. Tell the jury whether, when you entered the cabin, he had the bottle of beer in his hand or picked it up after you entered.
A. I saw him when I came in the cabin; I saw him with the bottle in his hand. I didn't take notice if it was beer in the bottle or whether he had drank it out, and as I entered he was sitting something like that [illustrating], and as I came to windward he raised up with the bottle to split me in the head.
Q. And didn't you say before Mr. Ackiss here, this gentleman, and before Mr. Marsilliot, when he raised to strike you with the bottle and when you shot him, he was facing you?
A. He was facing me in a way; yes, sir.
Q. When he rose to strike you, and when you shot him, he
182 was facing you?
A. Yes, sir; in a way

Q. Now, then, when you shot him, he fell back in his chair, you say?
A. Yes, sir.
Q. What did you do then?
A. Well, what came to my head then was the mate.
Q. What came to your head then was the mate?
A. Yes, sir.
Q. And you say you went into the captain's room. Do you mean the sleeping room?
A. Yes, sir; I ran into the captain's room.
Q. You ran into the captain's room and got his pistol?
A. Yes, sir.
Q. The captain's room is here, is it not?
A. That's the captain's room [pointing to diagram].
Q. Where were the pistols in that room?
A. One was lying on the shelf.
Q. Where was the other?
A. Under the pillow.
Q. When you got the captain's pistols did you stop to see whether he was killed or not?
A. I didn't know what I was doing, Mr. White, my head was all out of order. I can't tell you punctually what happened; I tell you what I know.

Q. That's what you came upon the stand to do, to tell us
183 what happened, and when I am questioning you I want to be as considerate as possible to a man in your position, and in asking you questions a little loudly I do not mean to confuse you, but to let the jury hear you. If I ask you anything that hurts your feelings, say so, and I will refrain.
A. It will not hurt my feelings, Mr. White, and I will tell you as far as I know.
Q. Tell the jury where you got the pistols.
A. There's a shelf, and there's the pistol [pointing to diagram].
Q. And so you went in there and got them because after you shot the captain you thought of the mate?
A. Yes, sir.
Q. What did you do then?
A. Ran up on deck through this companion way.
Q. Ran up on deck through the after companion way.
A. Yes, sir.
Q. That necessarily made you go through the pilot house?
A. Yes, sir.
Q. Who was at the wheel then?
A. Martin Barsted.
Q. You ran through the wheel house and through this door here?
A. Yes, sir.
Q. And went along on the port side of the vessel?
A. On the port side, sir.

184 Q. Did you go up to a man named John Linn who was standing about amidships?
A. Yes, sir.
Q. Did you say anything to him?

A. Yes, sir; I remember asking him where the mate was. I thought then the mate was after me as I didn't see him around the deck.

Q. You thought the mate was after you as you didn't see him around the decks?

A. Yes, sir; that's the way I felt, just because I knew what the man had done to me.

Q. You felt he was after you when you first left the captain's room where you shot the captain?

A. Yes, sir.

Q. Where did he tell you the mate was?

A. He says: "He is up aloft."

Q. You saw him then up aloft?

A. Yes, sir.

Q. Then you knew he wasn't after you, if he was up aloft?

A. Yes, sir; I knew that.

Q. Then, notwithstanding you saw him up aloft, you went forward and got up on top the forecastle house, didn't you?

A. Yes, sir.

Q. Didn't you call him down?

185 A. I did not call him down, but I says something to him in the excitement; that I did, but calling him down I did not do, because the man was coming down from the rigging.

Q. Did you not state to Mr. Aekiss here and to Mr. Marsilliot on the eighth of November that you called him down from the rigging?

A. No, sir; I never said that I called him down, but I said I said something to the man.

Q. Do you mean to tell the jury now you don't know what you said to him?

A. I said Mr. Saunders.

Q. All the men aboard the vessel called the mate Mr., didn't they?

A. Yes, sir.

Q. Didn't you say, "Come do*w*n?"

A. No, sir; not that I remember of.

Q. May you not have told Mr. Saunders, "Come down?"

A. I might have done it, sir, in the condition I was in.

Q. You wanted him to come down, didn't you?

A. Well, Mr. White, what do I know I was doing in the condition I was. I know the man; what he has done to me.

Q. Never mind. You went there and may have called him down; you don't remember?

A. Yes, sir.

Q. When he came down you were standing there on the top of the forward house?

A. Yes, sir.

Q. And he went on the deck of the forecastle head?

186 A. Yes, sir; came down from that rigging, and when he was on the third ratline or the fourth ratline from the ship——

Q. When you pointed the pistol at him didn't he say "Don't shoot," or something like that?

A. He said something similar to that, but he didn't say "For God's sake don't shoot me," because he never had any God or I never would be put here where I am to-day.

Q. Do do think it is consistent, you having a God, to put him where he is?

A. Mr. White, I couldn't have got out of it if I hadn't run right overboard myself?

Q. You left the captain's cabin and ran forward on the deck load and called the mate from the rigging, where you saw him?

A. Yes, sir.

Q. When you spoke to John Linn when you first came out of the captain's cabin didn't you ask him where the mate was?

A. Yes, sir.

Q. Did he not tell you he was in the rigging?

A. He told me he was; he is aloft.

Q. Didn't he ask you what was up?

A. He didn't say anything to me, sir.

Q. Didn't you tell him——

A. Not that I remember of.

Q. One second; you haven't heard me. Did you not tell him, "I have killed the captain, and now the mate goes too?"

187 A. No, sir; that belongs to John Linn, because he said that through the forecastle window; that's what he went to call out.

Q. And you heard him say it through the forecastle window?

A. The rest of them heard him saying that, and all said it in the boat before they were fetched here in the United States court.

Q. You mean to say every one of the crew stated on the sailboat that John Linn said at the window of the forecastle that "he had shot the captain, and now the mate goes too?"

A. That's what they said John Linn said when they called him at the forecastle.

Q. You know the men will be put on the stand to contradict that statement, and if you are not certain about it don't make it.

A. I will say I did not hear them, no, sir; but the crew, the Spaniard and this Andrew March, I heard them saying in Bahia that John Linn came to the window—to the consul—and he says now the captain is gone, and the mate will go too, he says.

Q. Did you not hear John Linn say to the consul at Bahia——

A. No, sir.

Q. One second; that when you rushed out the cabin you rushed up to him and asked for the mate, and he told you he was aloft and

188 asked you what was up, and you said to him these words, "I have killed the captain, and now the mate goes too." Did you not say that to Linn and did not Linn say that to the consul at Bahia?

A. That I don't know. I didn't say that to John Linn.

Q. You did not say that to John Linn?

A. No, sir.

Q. How many times did you shoot the mate?

A. Three times, sir.

Q. Are you certain of that?

A. Yes, sir.

Q. Why are you certain of it?

A. Because I know when he came towards me with the marlin spike I shot once, and he came up close to me and I shot twice and the man

fell. Some of the men say I shot four times, some three times, and I say I shot three.

Q. You have just said that at that time your mind was so upset you didn't *not* remember what you said to the mate. How is it if your mind was so upset you remember you shot three times and don't remember the other?

A. I remember the shooting three times—that I remember.

Q. And you say you did not shoot but three times?

A. That's all.

Q. At which of these shots you fired did the mate fall?

A. I think the last, sir. I don't remember that enough exactly, but he fell down after I had fired the third shot.

189 Q. Where did he fall?

A. About forward of the forecastle head, sir; right here, sir.

Q. He fell right there on the left-hand side of the forecastle head?

A. Yes, sir.

Q. Where the steps that come down——

A. Yes, sir.

Q. Did he fall on his face or back?

A. Yes, sir, he was lying on his face, if I remember right.

Q. What did you do when you shot him?

A. There I was, I didn't know, and John Linn came up and the rest of them was in the forecastle, and they came out and we threw the mate overboard.

Q. Andersen, did you call these men up?

A. No, sir, not to my knowledge I didn't; not to my memory—John Linn was the first——

Q. When you make the statement you did not do it to your memory, do you mean you did not do it, or don't remember whether you did it or not?

A. I didn't call the men up.

Q. You did not call the men up?

A. They were coming up then, and John Linn was the first one up to me, as he came from the lee side of the house, and to tell the

190 truth it was John Linn called the rest of them up.

Q. You do remember you did not call the men up, but John Linn called them up?

A. Yes, sir.

Q. Did you state to the men you were in charge of the vessel?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Your memory and mind are such you can remember you did not say you were in charge of the ship?

A. Yes, sir.

Q. Did you have the pistols in your hand at that time?

A. I don't remember whether I had them in my hand or where they were, sir. I might have had them in my pants pocket.

Q. If you can remember that John Linn called the men up why can't you remember where you had the guns?

A. I had three guns; if I had two in one hand and one in the other I can't say, I don't remember.

Q. I asked you if you had them in your hand after you had done the shooting?

A. I might have had them in my hand.

Q. You say you threw two overboard. What time was that?

A. After the vessel was proposed to be set on fire.

Q. What time of day?

191 A. About half past eleven.

Q. Who was present?

A. Nobody. I was on the lee side of the vessel.

Q. Nobody was looking at you?

A. No, sir; because they were all down in the cabin and scattered around—I didn't watch the fellows.

Q. And while they were down in the cabin you threw them overboard?

A. They might have been in the cabin or some in the forecastle, and I threw them overboard. I didn't think anything of them then, and didn't want to lug them around with me.

Q. Didn't you say to Mr. Ackiss or to Mr. Marsilliot, on the eighth of November, when you pointed the gun at the mate, he said, "Don't shoot," or something like that?

A. I did say it.

Q. He said that before you had shot at all?

A. No, sir; after the first shot was fired.

Q. Didn't you say, "He came at me with a marlin' spike, and when I pointed the gun at him he said, 'Don't shoot,' or something like that, and the first shot did not take much effect?"

A. Yes, sir.

Q. You did say that?

A. Yes, sir.

Q. Now, you say he did not ask you not to shoot until after the first shot?

192 A. Yes, sir; because I have not been questioned before and could not answer punctually.

Q. And when you made the statement on the eighth of November it was a voluntary one?

A. Before what gentlemen?

Q. Before Mr. Ackiss and Mr. Marsilliot?

A. Oh, yes, sir.

Q. Now, did you tell the men to throw the mate's body overboard?

A. No, sir.

Q. Who suggested to throw it overboard?

A. Well, we all threw it overboard.

Q. I didn't ask who did it, but who suggested it should be thrown overboard?

A. I don't remember that.

Q. Do you remember you did not suggest to throw it overboard?

A. I don't remember of saying anything.

Q. I ask you again, Andersen, did you tell the men to throw the mate's body overboard after you shot him?

A. No, sir.

Q. You are positive about that?

A. Yes, sir.

Q. Did they throw the mate's body overboard of their own accord?
A. Yes, sir.
Q. Did you have hold of the body, too?
193 A. Yes, sir; I think I did.
Q. But you are positive you said nothing to them about throwing it over?
A. No, sir.
Q. Who suggested that you should go aft to the captain's cabin and throw the captain's body overboard?
A. Well, sir, I don't know that. I might have went down there ahead of them; some of them might have went ahead of me; that I don't know, sir.
Q. You mean to say you did not tell them to go down to the captain's cabin and throw his body overboard?
A. I might have told them that—to go take the captain—but commanded them I did not.
Q. Well, if you told them to do it do you remember it?
A. I might have asked them, but I did not tell them, as I had no orders aboard the vessel.
Q. You might have asked them to do it, but did not command them to do it.
A. No, sir.
Q. Did you ask them to do it?
A. That I might have done.
Q. Of course, you might have done a great many things, but I ask you if you did ask them to throw the captain's body overboard?
A. Well, I asked them.
Q. You asked them?
194 A. Yes, sir.
Q. Did you ask them to throw the mate's overboard, too?
A. No, sir.
Q. You are positive about that?
A. Yes, sir; positive about that.
Q. Did you command them to throw the mate's body over?
A. No, sir.
Q. (By the COURT.) How long was it after you shot the mate the last time before his body was thrown overboard?
A. Very shortly, sir. John Linn, he came from the lee side of the house, came running up, and I think he was the first man I got hold of, and the rest of the men came out of the forecastle.
Q. (By Mr. WHITE.) The mate's body was thrown overboard almost immediately after you shot him?
A. Not immediately; it might have been two or three minutes.
Q. You say as soon as the men came out?
A. Yes, sir.
Q. Then you asked them to go aft and throw the captain overboard?
A. Yes, sir.
Q. Was that done?
A. Yes, sir.
Q. Did you have hold of the body?
A. Yes, sir.

195 Q. After the captain's body was thrown overboard did you invite them down in the cabin to have a drink?

A. That's what they say.

Q. I asked what you say?

A. I say, "Men, you can do with me as you like—put me in irons and take me to port; that is what I have to do to save my life."

Q. I repeat, and you have intelligence enough to understand me, did not you invite those men to come down in the cabin after the captain's body was thrown overboard and take a drink?

A. No, sir; not that. I know all, but that's what they have said. I have said that, too, in the statement that I gave when I went before the commissioner. I told Mr. White I took them down and gave them a drink.

Q. Is that a lie?

A. No, sir; that is what I said.

Q. Did you tell the truth when you said it?

A. I told the truth in Bahia. I think I must tell it, as they have come here to me, and I think there is no harm in that.

Q. Now, you say you did not, after the captain's body was thrown overboard, invite the men down in the cabin to take a drink?

A. I didn't say I didn't. I say I did if they have it so, but
196 I don't know everything about drinks in the condition I was in.

Q. Did you ask them down in the cabin to take a drink, or give them a drink, or did you not?

A. I did not.

Q. Then you are positive you did not?

A. Yes, sir.

Q. Didn't you say to Mr. Ackiss and Mr. Marsilliot, on the eighth of November, here, these words: "I took them down in the cabin and gave them a drink?"

A. Yes, sir; I did, sir.

Q. And you said, it although you knew you did not do it?

A. Because I was not positive whether I did or not, although I feel certain anything like that was not on my mind at that time. That's the only thing I said.

Q. You voluntarily stated it in the presence of these gentlemen; nobody asked you the question?

A. No, sir; I voluntarily done it.

Q. And now you say it was not so; you didn't invite them to take a drink?

A. I say I might, but I don't think my mind was on any such thing as that, as I am not in love with whiskey.

Q. Did you take a drink with them then?

A. I think I did, sir.

Q. How could you take a drink with them unless somebody asked them down in the cabin to have a drink?

197 A. I didn't ask them down in the cabin. I went down in the cabin and they all came down.

Q. Did any of those men know where the captain's things were in the cabin?

A. No, sir. Martin don't know where this lock chest was before he asked me.

Q. Isn't it a fact that those ordinary seamen never go in the captain's quarters unless they are called there?

A. Yes, sir.

Q. But you knew where all the captain's things were?

A. Yes, sir. So did the engineer.

Q. Who got out the whiskey after you got down in the cabin?

A. I think Martin asked me where the bottle of whiskey was.

Q. Well, did you go and get it for him?

A. I think I did, or he did it, I don't know which; that I don't remember entirely.

Q. How could he get it if he didn't know where it was?

A. I told him where it was in the storeroom.

Q. Now tell the jury who got the whiskey, you or Barsted?

A. Gentlemen of the jury, I don't know exactly who got it—I or Barsted. If it was me got it I don't know it.

Q. But you know you took a drink?

A. I did that, sir; took a drink.

198 Q. Did you have the pistols at that time?

A. I think I did, sir.

Q. After taking the drinks down in the cabin did you get the chart and come up on deck with it?

A. I didn't take it on deck, but took it on the forward table.

Q. Well, when you took it there what did you do?

A. Well, we looked to see the longitude we was in and whether he could make port.

Q. Was there anybody among you who could know the longitude and latitude?

A. I know pretty well myself by guesswork; that's all I knew about it; tried to make it the best I could, and the Spaniard was trying to do what was right.

Q. Then, notwithstanding you have been a cook most of the time, you are a sailor, too?

A. Yes, sir.

Q. You know how to sail a boat?

A. Yes, sir; I get a good crew I can do it.

Q. And you thought on that occasion you knew how to get at where the vessel was yourself?

A. By guesswork, sir; that's all.

Q. And you think now if you had a good crew you could sail a vessel yourself?

A. The vessel would have been taken into port if there had been men aboard the vessel.

199 Q. I am not asking you about that. Was Martin Barsted at the wheel at the time you shot the mate and when the bodies of the mate and captain were thrown overboard?

A. Yes, sir; but Martin Barsted didn't see me shoot the mate, as he stated yesterday, as there is a boat goes in between the skylights and this pilot house here.

Q. That's what you say—he did not see you, because there is a boat between the skylights?

A. Yes, sir; and all of the vessel you could see was up to here [pointing], and when you got here you could see a man on the deck load.

Q. You did shoot the mate?

A. Yes, sir.

Q. Then, if he says he saw you shoot the mate, he only says what you admit yourself. Well, did you find by looking at the chart where the vessel was?

A. Not exactly, sir; I know pretty well where she was. She was in 17 south, but how far off land she was, or anything like that, I don't exactly know.

Q. Then what did you conclude to do about the vessel?

A. To take her into port, and leave everything like it was in the vessel. That was my conclusion to do.

Q. What kept you from doing that?

A. They came to work, and they didn't care about doing anything what was right, and paid their attention in the cabin to plunder the cabin, turned everything upside down, and they threatened me.
200 I felt like jumping overboard instead of staying aboard the vessel.

Q. The members of the crew scared you then?

A. Yes, sir.

Q. And you thought of jumping overboard because you were afraid of them?

A. Because I was afraid somebody would come and pick us up as pirates.

Q. Why were you afraid of that?

A. I wasn't in my senses, and, as the men turned out, there was only one man there to do what was right and comfort me in the condition I was in, and that was the Spaniard.

Q. And haven't you said they all told the truth?

A. They all spoke the truth to my face, but when they came up here they haven't told the truth.

Q. Didn't you say they told the truth in their statements to the consul at Bahia?

Mr. McIntosh. When?

Mr. White. In their statements before Mr. Ackiss and Mr. Marsilliot on the eighth of November.

A. I wasn't present when they made their statements, and asked them if they told the truth, and they said yes; and I asked John Linn, and he said he told the things as they happened; and I have got witnesses here on the fact that Spaniard got up in front of a man and told him, "Look here, you know how things were aboard that vessel, and
201 I had to stop *the* men from robbing the vessel, and if the men had been like you I would have got the vessel in port." I have got witnesses for that.

Q. I don't want to interrupt your questions, but am letting you go on as much as possible. Try and answer the questions as they are asked. At whose suggestion was the vessel burned?

A. The engineer.

Q. You wanted to take the vessel into port?

A. Yes, sir.

Q. You urged them to take the vessel into port?
A. I wanted to do what was right.
Q. You told them what you understood to be right?
A. Yes, sir; take the vessel into port.
Q. Did you insist they should take the vessel into port?
A. I insisted the first going off.
Q. What do you mean by the first going off?
A. The first two or three hours I insisted upon their behaving themselves, but they paid no attention.
Q. I am asking you about the burning of the vessel. Did you insist the vessel should not be burned, but carried into port?
A. Yes, sir; I wanted to do that.
Q. Did you tell them that?
A. I don't remember of telling them that, because I was frightened the way the men turned out to be.
Q. You were afraid of who—the men?
202 A. I can't say I was afraid of the men.
Q. What were you afraid of, then, when you say they made the suggestion to burn her and you were afraid not to yield to their suggestion?
A. I was afraid the way they turned out to be.
Q. How did they turn out to be?
A. I couldn't exactly describe to you how a lot of sailors turn out aboard a vessel; I can't do that, Mr. White.
Q. All right; but I repeat, did you insist that the vessel should be carried into port or be burned?
A. I did not insist that she should be burned, but I insisted that she should be carried into port the first going off.
Q. Did not Barrial and John Linn both advise you to carry the vessel into port, and didn't you tell them no?
A. No, sir.
Q. You did not?
A. No, sir; Barrial did that; he wanted me to get her into port, and I says, "All right." John Linn was the man to propose to take the vessel back to the States.
Q. Why was not that done? If John Linn wanted to take her back to the States, and Barrial wanted to carry her into port, and you did, why was not that done?
A. Why didn't they go to work, then, aboard the vessel, and attend to their sails?
Q. Did you order them to do it?
203 A. No, sir; I had no charge of the vessel, sir.
Q. Didn't you tell Horsburgh, the engineer, that after the mate was dead you were next in command?
A. No, sir.
Q. Didn't you contend the cook was next in command after the mate was killed?
A. No, sir.
Q. Don't you now say that's the case on American vessels?
A. No, sir; then comes the second mate.

Q. If there is no second mate?

A. If there is no second mate, of course the cook does it.

Q. If Horsburgh had shipped as engineer and not second mate, he was not second mate, was he?

A. It was understood aboard that boat from the time he shipped in Boston aboard that ship he was second mate, and he did the work of second mate to the best of his ability.

Q. Didn't you advise him, though, if he did not ship as second mate he need not do the work?

A. No, sir.

Q. Didn't you tell him so?

A. No, sir; I told him he signed for engineer.

Q. And didn't you tell him if he signed as engineer he need not work as second mate?

A. I don't think I did.

Q. Did not you do it?

A. I didn't go to work to put him against the captain.

204 Q. Did not you tell him they could not make him act as second mate?

A. No, sir; he said that himself—as he shipped as engineer they couldn't make him work as second mate.

Q. Didn't you tell some of the officers of the Boston harbor police that he shipped as engineer and he couldn't act as second mate?

A. No. Let me tell you—it was two officers came down in the galley and asked me what the trouble was.

Q. I am asking you this simple question—I am asking you with a view to contradicting you—if you did not tell two members of the Boston police that this man Horsburgh shipped as engineer, and you told him they could not make him act as second mate?

A. No, sir; I did not.

Q. Didn't you tell Horsburgh that, as he shipped as engineer, they could not make him serve as second mate?

A. No, sir.

Q. Was not it your judgment as a sailor that, as he had shipped as an engineer, he could not be made to act as second mate?

A. Yes, sir; that is my judgment.

Q. And it is also your judgment that when the captain and mates, first and second, are gone, the cook is next in command?

A. If there is no engineer and no second mate.

Q. The engineer don't rank you?

205 A. The engineer ranks me aboard a vessel as officer, if there is an engineer aboard the vessel.

Q. Does he rank you as a sailor?

A. I am not a sailor; I am a cook.

Q. You just said if the mate and second mate were out of the way you would command the vessel?

A. Yes, sir; that's very likely. They have no man aboard could handle her, and I thought I was capable of doing it, and it is my place to do it.

Q. And you did think you were capable of handling her?

A. I did at first. If the crew had done what was right I would have done at least the best I could.

Q. How long after the shooting of the captain and mate and the throwing their bodies overboard was it that you went apart to yourself and threw those pistols overboard?

A. That was after it was proposed to set the vessel afire; it was in the afternoon.

Q. How long before you left the vessel?

A. Half past two we left the ship.

Q. You say Martin Barsted was drunk?

A. Yes, sir.

Q. How much was in the bottle you took out and gave to them?

A. Not much into it; but they went and stole whiskey when I didn't see them.

206 Q. Who did it?

A. Martin Barsted.

Q. And you said when you started out on the sailboat all were drunk except you and Barrial, the Spaniard?

A. The Spaniard and me was sober in the boat, and the engineer was drinking beer. I didn't see him drink any whiskey aboard; he might, but I didn't see him.

Q. You said this morning when in the boat they were all drunk but you and the Spaniard, and you and the Spaniard had to sail the boat?

A. They was all pretty full; at least Martin was.

Q. Was it all of them?

A. I said all of them but Martin was drunk.

Q. Now, you say that after it was determined to burn the ship, the boat was lowered. Who ordered the boat to be lowered?

A. I did not order the boat to be lowered. They all done that without my orders.

Q. Who was doing any ordering? Who was ordering doing anything?

A. Wasn't anybody doing any orders. They all went to their work; so did; I went to work to get the stores up.

Q. Who helped you get them?

A. Martin was handing them to me.

Q. What time was that?

A. In the afternoon.

Q. Before you left?

207 A. Yes, sir; about half past one—something like that.

Q. How could Martin be helping you get the stores up if he was drunk?

A. He was pretty full, but wasn't so full he couldn't work.

Q. He wasn't too drunk to obey your orders?

A. I never gave him orders, Mr. White.

Q. The captain had a wallet with some money in it, didn't he?

A. Yes, sir.

Q. Did you or not take the money out of that wallet after the body was thrown overboard and give the men some money?

A. I took the money out the wallet and the engineer took it out the captain's desk and gave it to me to see what was in it. It was three paper bills.

Q. And you gave it to some of the men?

A. Yes, sir.

Q. That was shortly after the captain's body was thrown overboard and you went down in the cabin?

A. Yes, sir; pretty soon.

Q. The engineer did not open the wallet himself; he gave it to you?

A. He gave it to me; he says, "See what is in there," and I didn't think about nothing——

Q. But you did open it and take the money out and give it to the men?

A. Yes, sir.

208 Q. In the statement which you made here on the eighth of last November to Mr. Ackiss and Mr. Marsilliot, the stenographer, "The Englishman, he spoke and says 'We will set fire to her.'"

A. Yes, sir; he proposed it.

Q. "'And take the boat,' he says, 'and go ashore?'"

A. Yes, sir; that's right; "and make land," he says.

Q. "At the time, of course, my mind was not standing on anything; I didn't know what foot I was standing on."

A. Yes, sir; I felt same as that.

Q. One second. "I told him 'I will see if they are willing.'" You said that?

A. Yes, sir.

Q. "I took the Spaniard aside and asked him alone what we should do. 'All right,' he says."

A. Yes, sir.

Q. "Then it was made up between us we would give ourselves up, and didn't know what to do with the vessel"——

A. And so we did not know what to do with the vessel.

Q. I will give you the details afterwards. "He was willing; he said 'All right,' and I asked him how we could come ashore in Brazil and everything like that. I didn't know the country; had never been there before. He said everything was all right, so I asked John Linn; I spoke to him about it and he says, 'Are the rest of them willing?'

209 I told him, 'Yes, as far as I know.' All the men then were standing forward." You made that statement?

A. I made that statement, but they wasn't forward. The engineer was standing here and Martin here and Andrew was up here.

Q. Then you did go to the Spaniard and ask him if he was willing to have the vessel burned, and he said all right?

A. Yes, sir; I did that.

Q. You went to John Linn and asked him if he was willing to have the vessel burned, and he said all right?

A. Yes, sir.

Q. Did you go to any of the others and ask them if they were willing to have the vessel burned?

A. No, sir; the engineer proposed it.

Q. You told John Linn, when he asked you if the others were willing, yes, they were willing, as far as you knew?

A. Yes, sir.

Q. And then the vessel was burned?

A. Yes, sir; they went to work to destroy the vessel. That was after they turned everything upside down that was suggested.

Q. Did you forbid their taking their clothes ashore?

A. I told them they couldn't take any clothes ashore in the boat; I didn't forbid them to do that; I said we could not take much clothes with us; it was an impossibility to do that.

210 Q. I did not ask you if it was impossible. You told them not to take their clothes?

A. No, sir.

Q. What did you tell them?

A. They says, "What we going to take?" and I says, "I am going to take what I can put on myself—a suit or two of underclothes; that's all I want, to keep myself warm."

Q. Didn't the engineer come to you and show you his bank book and ask if he could take that, and you took it from him and threw it overboard?

A. No, sir; that's wrong. The engineer came out of the companionway and says to me, "I don't want that." I says: What is it?" and he says, "It is my bank book," and I says, "If you don't want it you throw it overboard," and I was in the galley and he says, "No, you throw it overboard," and I says, "No, you throw it overboard yourself."

Q. Who threw it overboard?

A. He did it himself.

Q. You are positive of that? I am going to put him here to contradict you.

A. I am positive of that; but he wanted me to throw it overboard for him.

Q. Why did he want you to throw it overboard if the vessel was going to be set on fire?

A. I can't account for that, Mr. White; I can't account for those men stealing.

211 Q. Anderson, were you not on board that vessel known in the forecastle as what is known as a "sea lawyer?" Did not the men so know you and speak of you?

A. That might be among the sailors, sir; but that is not att.

Q. Anderson, just before sailing from Boston this year had you or not attended a trial there known as the Bram trial, where the man was accused of killing the mate?

A. No, sir.

Q. Did you read about it?

A. Very little, because I never had no interest in anything like that.

Q. But you read it, all the same?

A. I might have looked at the heading, but reading the trial or anything like that I did not, because it did not interest me, sir.

Q. What became of this bottle which the captain had in his hand when you say he rose up and faced you and you shot him?

A. That I don't know, sir; the bottle may have dropped in between the chair and lounge, as I didn't look for it.

Q. How was the captain sitting in his chair when you went back to the cabin to take his body and throw it overboard?

A. It was sitting like this, with this hand like that [illustrating].

Q. His right hand over the arm of the chair?

212 A. Yes, sir.

Q. Weren't both hands in his lap?

A. No, sir; I took this hand—I was the first down there.

Q. What did you take that hand for?

A. Because I wanted to see if he was living; because I was frightened because he looked like he was 'live.

Q. And you felt his pulse and he did not have both hands in his lap?

A. No, sir.

Q. Where was the beer bottle?

A. I didn't see it; it might have fallen in between the chair and the lounge.

Q. Did you see it afterwards at all?

A. Not that I remember of.

Q. When you left the ship you say you fired three shots of a pistol?

A. That was late in the night.

Q. What did you do that for?

A. More to wake them up than anything else, because I never thought about that; I didn't mean to harm——

Q. Didn't you tell Mr. Ackiss and this gentleman you did that just as you were leaving the ship; just for fun?

A. We was a long way from the ship.

Q. Didn't you say you fired it just for fun?

A. I never thought about that.

Q. Didn't you say you did it just for fun?

213 A. Yes, sir; I might have done that. I didn't mean no harm by it, sir.

Q. Now, you stated this morning that John Linn shot the dog and not yourself.

A. He shot the first shot, yes, sir; and he drowned the cat overboard, and I asked him to drown the little kitten aboard the vessel, and he done that, too.

Q. We will leave the kitten out. You further stated when you and John Linn were arrested in Bahia you said to John Linn, "Now tell the truth."

A. Yes, sir.

Q. And then you said to the American consul what you now say was a lie, namely, telling him where you got the pistol?

A. I didn't say where I got the pistol from. I said he carried a gun.

Q. You just said you told the consul a lie when you said you got the pistol from the trunk.

A. In my own judgment, but not what the consul wrote.

Q. You asked Linn to tell the truth?

A. Yes, sir; I asked John Linn to tell the truth.

Q. But you did not yourself tell the truth?

A. Yes, sir; so far as I could, sir.

Q. You say you did not hear the statements made by John Linn and Barrial to the American consul?

A. No, sir; I don't know what he put down there.

Q. Weren't you present when they made their statement?

A. No, sir.

214 Q. Weren't you in the same room?

A. One by one.

Q. You were not in the same room with them? You stated this morning the Spaniard said, when he came to Bahia and you saw him——

A. Yes, sir.

Q. Were you in the cell with him?

A. Yes, sir; we were all put together first.

Q. And you asked him how he came to be arrested, and he told you that the boat gave them away?

A. Yes, sir.

Q. Positive of that?

A. Yes, sir.

Q. Because I propose to put him on the stand to deny it.

A. Yes, sir.

Q. You stated this morning that Martin Barsted told you on that same occasion, when you were all arrested and in prison in Bahia, that he would not swear himself away for any man.

A. He says, "I won't swear myself to hell for anybody."

Q. And you asked him did you make him drink?

A. Yes, sir.

Q. Did you make him take the money?

A. I didn't say take the money.

Q. What did you ask him then?

A. He told me, he says, "You made us burn the vessel." I
215 says, "I made you burn the vessel?" I says, "Did I make you pull out the slop chest?" "Yes; you did that." "Did I make you drunk, too?" "Yes; you did that."

Q. That's all you said to him?

A. Yes, sir.

Q. And that occurred in the prison in Bahia?

A. Yes, sir.

Q. And you say this morning all were drunk on the sailboat, except the Spaniard and yourself?

A. All excepting the engineer. He might have drunk some beer. He was not disturbous.

Q. Didn't you say all were drunk but you and the Spaniard, and you had to do the sailing of the boat?

A. We did that all the time.

Q. And didn't you say you did it because the others were drunk?

A. Yes, sir; because they didn't know how to handle the boat. That's why I had to do it, sir.

Redirect examination by Mr. McIntosh:

Q. Anderson, this engineer did second mate's duty, did he not?

A. Yes, sir; he did, part of the voyage.

Q. Wasn't he next in command to the first mate?

A. Yes, sir.

216 Q. Wasn't his authority to order recognized on board the ship as next in command?

A. Yes, sir; in his watch.

Q. He made a protest when he first went aboard the ship, did he not, against doing second mate's duty?

A. Yes, sir.

Q. And afterwards came into it?
A. Yes, sir.
Q. Claimed he had not signed for that?
A. Yes, sir.
Q. And his authority was recognized in the watch as second mate?
A. Yes, sir.
Q. He had a room in the forward cabin, didn't he?
A. Yes, sir.
Q. Where the second mate's room is?
A. Yes, sir.
Q. Show the jury where the second mate's cabin is; where Engineer Horsburgh was.
A. There it is; right there [pointing to diagram].
Q. Where is the first mate's room?
A. Right here, sir.
Q. There is the pantry?
A. Yes, sir.
Q. There is your room?
A. Yes, sir; that's my room.
217 Q. Did you occupy your room during the entire voyage?
A. Yes, sir; until about a week before this happened.
Q. Did you then move?
A. I had to move, sir.
(Question objected to as immaterial as to whether or how long he occupied his room before the occurrence happened.
Counsel for the accused stated that he desired to prove that the accused moved his room and slept in the galley because of his fear of the mate, but the court ruled out the testimony and counsel excepted.)
Q. I understand it was the second mate, this man Horsburgh, that made the proposition to fire the vessel?
A. Yes, sir; he proposed that.
Q. And acting under his order the vessel was fired?
A. Yes, sir; he took Andrew March and him.
Q. Who, in point of fact, did the firing of the vessel?
A. Andrew March and the engineer, sir.
Q. Andrew March and the engineer themselves?
A. Yes, sir; I was down in the galley, and the engineer was tapping kerosene, and I sent up two or three buckets myself, what I took from the engineer, who was tapping, as me and the engineer was in the galley then.
Q. And you handed it up to who?
A. To Martin.
Q. You did not have any pistols in your hand when you were handing up the kerosene?
218 A. No, sir; I had one that nobody seen.
Q. Where did you have it?
A. In my pocket. Nobody seen the pistol.
Q. You say that the captain's wallet was taken and was handed to you by the engineer?
A. Yes, sir.
Q. And you opened it?

A. Yes, sir.
Q. And you divided out the money in it?
A. Yes, sir.
Q. W'o did you give the money to?
A. I gave one dollar to Juan Barrial and one to John Linn.
Q. And kept one yourself?
A. No, sir; I gave it to Martin Barsted; he was in there, and he had it when we came aboard the Lancaster, if I recollect exactly. I don't know—he have some American money.

Recross-examination by Mr. WHITE:

Q. What became of the captain's watch?
A. I took that.
Q. What did you do with it?
A. I had to sell it in Belmont.
Q. You did sell it in Belmo't?
A. I had to.
Q. What became of the compass?
219 A. That was in the boat; that was throwed overboard before we reached the beach.
Q. Who threw it overboard?
A. I don't know which one of us.
Q. You took the captain's watch when you left the ship, though?
A. Yes, sir; I did.
Q. (By Mr. MCINTOSH.) And the compass was thrown overboard; was it thrown overboard by you?
A. No, sir; not that I remember of me throwing the compass overboard. I know it was throwed overboard before we got to the beach.
Q. (By Mr. WHITE.) Do you know whether the captain and mate were men of family? The captain has a family?
A. I heard them say that.
Q. Didn't you see his wife and daughter in Boston come aboard the ship?
A. I think his wife was there; that's what I heard afterwards, because I didn't know her. It was two ladies and a gentleman and the captain came aboard one day for dinner.
Q. Didn't you know it was the captain's wife?
A. Not then, sir.
Q. Mate Saunders was a man of family, too?
A. Yes, sir; he lived in Nova Scotia.
Q. How old a man was Mate Saunders?
A. I suppose 44 or 45; somewheres along there.

220 WALTER SMALL, on behalf of the defendant, sworn.

Examined by Mr. MCINTOSH:

Q. Captain Small, do you know this man [pointing to the prisoner]?
A. Yes, sir.
Q. Have you ever had him for a cook?
A. Yes, sir.
Q. Will you please state his character for sobriety and peace?
Mr. WHITE. His general character; not for sobriety and peace.

Mr. McINTOSH. Well, general character. What were your opportunities of knowing it?

A. The first time I ever saw the man I shipped him in Philadelphia, in '95; about July 20th, as well as I remember. He went with me until December 26th, I think it was, that I paid him off in New York, of the same year.

Q. Well, sir, what was his general character?

A. Well, he behaved himself when he was with me.

Q. Did you have any trouble with him?

A. No, sir.

Q. What is his character for peace and sobriety?

A. Well, sir, as far as I knew he done his duty with me aboard my vessel.

Q. Did you have any trouble with him?

A. No, sir.

221 Q. Is his disposition good? Is he a man of bad temper or disposition?

A. I don't know, sir; I never saw anything to cause him to be in a bad temper.

Q. You never saw him to be such?

A. No, sir.

Cross-examination by Mr. WHITE:

Q. Was he troublesome aboard your vessel?

A. Not aboard my vessel.

Q. And was that because you did not let the men say much on your vessel?

A. I have very little to say to my men.

Q. That is a fact on board of American vessels that the captain has to be very careful to prevent intimacy?

A. With some men.

Q. If intimacies are allowed, what is the result?

A. Trouble afterwards.

Q. In other words, give them an inch and they will take an ell?

A. Nine times out of ten.

Q. And on this voyage you had very little to say to the cook or he to you?

A. Yes, sir.

Q. And he did his duty while on board those six months?

222 A. Yes, sir.

JOHN ASBERG, on behalf of the defendant, sworn.

Examined by Mr. McINTOSH:

Q. Do you know the prisoner, sir?

A. Yes, sir.

Q. Do you know his general reputation?

A. Yes, sir; for a few years.

Q. You have?

A. Yes, sir.

Q. What is it, sir?

A. Well, very good, as far as I can remember; never heard a thing about his character of any kind.

Q. You never have?
A. No, sir.
Q. You have known him for the last two or three years?
A. Well, no; not exactly for the last two or three years, because I knew him before that.
Q. How long have you known him?
A. I have known him ever since he was a little boy.
Q. Then you have known him pretty well all his life?
A. Yes; but I have been away from Sweden a number of years, and I didn't know until here about eight months ago that he was here.

223 Q. Then what is his reputation as a man of peace?
A. Good, as far as I know.

Cross-examination by Mr. WHITE:

Q. Where do you live?
A. In Boston.
Q. What is your occupation?
A. Millwright.
Q. What opportunities have you had for judging of the reputation of the accused?
A. Well, not any more than we were schoolmates together.
Q. How many years ago?
A. Well, it is some fifteen years ago.
Q. Then you had not seen him since that time until about eight months ago?
A. Yes, sir.
Q. Where was he eight months ago?
A. In Boston.
Q. How long was he in Boston, and did you see him?
A. I don't know whether he was there a week or two.
Q. Then for the past fifteen years you have had no occasion to see him except for a week or two eight months ago?
A. That's all; but I have heard of him, of course, through my brother.

224 Q. Then all you know about him is that years ago you were schoolmates in Sweden?
A. Yes, sir.

Q. And you didn't know he was in this country until eight months ago, when he was in Boston a week or two?
A. Yes, sir.
Q. How often did you see him during that week or two in Boston?
A. I saw him twice.
Q. Then you have seen him twice in fifteen years?
A. No, sir; I saw him after that, a day or so, on board his vessel.
Q. Which vessel?
A. The "Olive Pecker."
Q. That was about the same time, eight months ago, that you saw him in Boston. He has not been to Boston since the twentieth of June?
A. Yes, sir; that's about it.
Q. Then you saw him in Boston some time last June?
A. Yes, sir.
Q. When he was there for a week or two?
A. Yes, sir.

Q. (By Mr. McIntosh.) Was he not intimate with your brother for a long while?

A. Yes, sir.

Q. And don't you know of this man's character and reputation as you know of a great many other people?

225 A. Yes, sir.

Q. Well, isn't it good?

A. Good.

JOHN DARNHARDT, on behalf of the defendant, sworn.

Examined by Mr. McIntosh:

Q. Were you acquainted with Captain Whitman, the captain of the "Olive Pecker?"

A. Yes, sir.

Q. Are you acquainted with his general reputation?

Question objected to as immaterial. The court sustained the objection, to which ruling of the court counsel excepted.

Counsel for the accused here stated that he rested his case.

Rebuttal testimony for the Government.

WILLIAM HORSBURGH, on behalf of the prosecution, recalled in rebuttal.

Examined by Mr. WHITE:

Q. Horsburgh, when you went in the cabin to take the captain's body out, how was the captain's body sitting in the chair at that time?

A. About like this, sir.

226 Q. Both hands in his lap?

A. Yes, sir.

Q. See any beer bottle in either hand?

A. No, sir.

Q. Did you see any beer bottle on the floor about him?

A. No, sir.

Q. Any glass sitting around out of which he had been drinking?

A. No, sir.

Q. You saw nothing of that sort?

A. No, sir.

Q. The cook says you first suggested the burning of the vessel. Is that true or not?

A. No, sir.

Q. Is it true or not he ordered the boat burned?

A. The vessel; yes, sir. One word from him would have saved the vessel, sir.

Q. Did any of the men suggest that the vessel should not be burned?

A. Yes, sir.

Q. Do you recollect who they were?

A. Yes, sir.

Q. Who were they?

A. Juan De Dios Barrial.

Q. Who else, do you recall?

227 A. No, sir; I don't recollect anybody else.

Q. What did the cook say when it was suggested to take the vessel into port?

A. He asked them if they wanted him to be hung.

Q. You are positive about that?

A. Yes, sir; certain of it.

Q. Were you drunk in the boat going from the "Olive Pecker" to the shore—in the small boat?

A. No, sir.

Q. Did you see any men drunk?

A. No, sir; nor any under the influence of liquor.

Q. The cook says he did not order the mate's body to be thrown overboard by you men, but you did it voluntarily, without orders. Is that so?

A. It would be no advantage to me to throw him overboard, or to us, that I know of. He did order him to be thrown overboard.

Q. When the body was thrown overboard did the cook curse it as it went overboard?

A. Yes, sir.

(Examination objected to as not rebuttal, and objection sustained.)

Q. He ordered the body to be thrown overboard, did he?

A. Yes, sir.

Q. Did he help?

A. Yes, sir; I am pretty sure he did.

Q. Did he suggest that it should not be thrown overboard?

228 A. Anderson?

Q. Yes.

A. No, sir.

Q. He said he didn't say he was in charge of the vessel. Is that so?

A. He said he was in charge of the ship and nothing must be done except to destroy her.

Q. He says he did not say to you he ranked next to the mate, and the captain and mate being dead he was in command. Did he say that or not?

A. Yes, sir; he spoke to me personally. He says when the captain and mate were gone he was in charge of the ship.

Q. You are positive of that?

A. Yes, sir.

Q. You have no animosity against the cook?

A. No, sir; nothing whatever.

Q. He says you took the captain's wallet out of the cabin after the captain was thrown overboard. Did you or not?

A. No, sir; but he offered me a dollar.

Q. Did he take it himself?

A. I couldn't say who took it; but he offered me a dollar, and I refused it; told him I had enough of my own.

Q. He says you did not come to him with your bank book and ask whether you could take it ashore. Is that true or not?

229 A. No, sir; he says we must not take any papers or anything ashore with us that will identify us; if we were arrested and these papers were found on us it would identify us. I told him I had nothing

but a bank book, and he asked me to let him see it, and I showed it to him and he took it and threw it overboard.

Q. It is not true you asked him to throw it overboard?

A. It would be a queer thing for a man to throw his money overboard. That is the same thing.

Q. Did you hear what John Linn said when he came to the forecastle house just before the mate was shot?

A. No, sir; I think he got there before I did.

Q. Were you in the prison at Bahia with John Andersen for a time?

A. The first day, I think, sir.

Q. The first day you were all in prison together?

A. We were only a short time together.

Q. Did he have any talk with you men?

A. Yes, sir.

Q. Did he tell you or any of the men in your hearing that you must tell the truth?

A. Not to my knowledge. He never told me that.

Q. Did you hear him tell the men anything they must say if asked about the way the captain's body was found in the cabin?

A. He told me, you know, engineer, the captain's body was on
230 the floor and a beer bottle alongside of it, and I told him I saw nothing of the kind; and when I went to the American consul he asked me——

(Objected to and objection sustained.)

Q. He says that he did not give any orders to lower the boat; that it was done by the men of their own accord. How about that?

A. He ordered the boat to be put down and to take him ashore.

Q. You heard him give the order?

A. Yes, sir; because he told me to put the dog in the boat.

Cross-examination by Mr. McIntosh:

Q. Horsburgh, you shipped as engineer aboard that boat didn't you?

A. Yes, sir.

Q. You were required to do second mate's duty, were you?

A. I didn't sign for that.

Q. Didn't you do second mate's duty out on the voyage?

A. I had to do it.

Q. Didn't you have your bunk in the forward cabin in the second mate's room?

A. Yes, sir; but that is the only one for the engineer.

Q. In point of fact, was not your watch the second mate's?

A. I stood the captain's watch.

231 Q. Is that the second mate's duty?

A. I believe it is.

Q. In other words, you were the second mate, acting second mate, aboard that boat, weren't you?

A. Acting second mate—not lawfully, I don't think.

Q. Anyhow, you were acting second mate. Now, will you please tell me when the first mate was killed why you weren't in command of the ship?

A. Why, I thought I was.

Q. Well, why didn't you assert your position then?
A. Why didn't I assert my position?
Q. Yes.
A. When a man comes to you and tells you you have got nothing to do with it, I don't think you would either.
Q. I am not talking about what I would have done. The mere fact Andersen told you he was in command, that the cook ranked the second mate, made you give up?
A. What else could I do?
Q. I don't know what else you could do.
A. Stand there and fall like a dog?
Q. You gave up?
A. I gave up; certainly.
Q. And you submitted to the cook. Now, while Andersen was handing up that kerosene, or while you were drawing up that kerosene——
Mr. WHITE. I asked him nothing about kerosene in rebuttal.
232 Mr. MCINTOSH. Possibly your are right.
The COURT. Go on, if you want to.
Q. While you were drawing up this kerosene from the kerosene barrel Andersen was passing it up, wasn't he?
A. Not to my knowledge.
Q. Wasn't he there when you were drawing it?
A. I wasn't there when they were drawing it.
Q. Didn't you draw any of the kerosene?
A. I did not.
Q. You are positive of that?
A. Certain.
Q. Didn't you set fire to that ship?
A. No, sir.
Q. Didn't you get some straw out one of the barrels?
A. No, sir; I went forward to the engine room to get some waste.
Q. For what?
A. To set fire to the ship.
Q. Did you get it?
A. When I came back she was on fire and the cook was standing over March while he was setting fire forward.
Q. You had nothing to do with setting the ship afire?
A. Only to open a barrel of oil.
Q. You didn't draw any of it?
A. No, sir.
Q. And didn't sprinkle any of it on the straw?
233 A. No, sir.
Q. And set the straw afire?
A. No, sir.
Q. (By Mr. WHITE.) You say when you came back you saw the cook standing over March?
A. Yes, sir.
Q. And March setting fire to it?
A. Yes, sir.
Q. Did he have a pistol then?
A. Yes, sir.

Q. Did you hear him say anything to March?

A. Heard him tell him to light it good. March was some seven feet below him—six feet, or something like that, as near as I can judge.

JOHN LINN, recalled on behalf of the prosecution in rebuttal:

Examined by Mr. WHITE:

Q. The cook has stated here that he did not say to you when you were standing about amidships, just after he rushed out of the cabin, that he had killed the captain and now the mate goes, too. Did he, or not, tell you that?

A. Yes, sir.

Q. Were you standing amidships?

234 A. Yes, sir; at the main rigging.

Q. Didn't you make the same statement to the consul at Bahia?

A. Yes, sir.

Q. You were amidships when he rushed out and asked you where the mate was?

A. Yes, sir.

Q. And when you asked what was up he said he had killed the captain and now the mate goes, too?

A. Yes, sir.

Q. He says he understands you to have said that down at the forecastle window?

A. No, sir.

Q. It was not at the forecastle window you said it, but he said it to you amidships?

A. Yes, sir.

Q. (By the COURT.) Where was the mate at the time?

A. He was aloft, sir.

Q. (By Mr. WHITE.) Linn, Andersen says he did not call you all up from the forecastle house to come on deck, saying he was in charge of the vessel. Is that true or not?

A. Yes, sir; he called us up.

Q. He called you up, did he?

A. Yes, sir.

Q. It is not true he did not call you up, but it is true he did call you up?

235 A. Yes, sir.

Q. Did he say he was in charge of the vessel?

A. I couldn't say he said those words. I was on the lee side.

Q. But you heard him call the men up?

A. Yes, sir.

Q. He says you called the men up to come on deck after the mate was shot. Did you?

A. No, sir.

Q. He says he didn't order the men to throw the mate's body overboard. Is that true?

A. No, sir.

Q. He did order the men to throw the body overboard?

A. Yes, sir.

Q. When you went back into the cabin where the captain's body was, to throw his body overboard, how was he sitting in the chair?
A. Sitting just like this, sir [illustrating].
Q. With his hands in his lap this way?
A. Yes, sir.
Q. Any beer bottle in his hand?
A. No, sir; no beer bottle that I saw.
Q. Did you see any on the floor near him?
A. No, sir.
Q. Did you see any beer glass sitting anywhere around him?
A. No, sir.
236 Q. Did you see any beer spilled on the floor anywhere?
A. N', sir.
Q. He says he first urged you men to take the vessel into port and not to burn her. Is that true or not?
A. No, sir.
Q. He says he tried to keep you men from burning the vessel, and wanted her taken into port?
A. No, sir; we advised the best we could to take her into port.
Q. And what did he say?
A. He says, "No; you want me to hang? There's nothing to be done but destroy the vessel."
Q. Was he in charge of the vessel?
A. Yes, sir.
Q. Was he issuing orders as to what was to be done?
A. Yes, sir.
Q. He says he was not.
A. Yes, sir; he was.
Q. He was?
A. Yes, sir.
Q. Did he invite you all down into the cabin to take a drink?
A. Yes, sir.
Q. Who got the whiskey, when you got down, that you drank?
A. I saw him put the bottle on the table when I got down.
237 Q. Did he get out glasses, too, for you all to take a drink?
A. There was a glass, too.
Q. He says that you shot that dog after you got ashore.
A. No, sir; I would have done so but the pistol I had was rusted fast and I couldn't use it.
Q. You couldn't use the pistol you had, and did not shoot it?
A. No, sir.
Q. Who shot it?
A. Andersen.
Q. He says you first shot it and didn't kil' it, and he went afterwards and shot him.
A. Yes, sir; I would have done it, but my pistol was rusted fast and I couldn't do it.
Q. You would have done it to put him out of suffering?
A. Yes, sir.
Q. What became of the compass?
A. He threw it overboard before we got close to the beach.

Q. Who threw it over?

A. Andersen.

Q. He says he don't think he threw it over, but some of the other men did this. You know he did throw it over?

A. Yes, sir; I was steering, myself, at the time.

Q. You had no pistol when you were on board the vessel, did you—the "Olive Pecker"?

A. No, sir.

238 Cross-examination by Mr. McIntosh:

Q. Where did you get your pistol from?

A. I got it in the cabin just before we went in the boat.

Q. You got it from the cabin before you went in the boat?

A. Yes, sir.

Q. Did Andersen give it to you?

A. No, sir; it was my own. I gave it to the captain when I came aboard in Boston.

Q. You gave it to the captain when you went aboard in Boston and got it from the cabin after the captain was killed?

A. Yes, sir; just before I jumped in the boat.

Q. Just before you jumped in the boat you got your pistol?

A. Yes, sir.

Q. When you all went down to take that drink, did you all go together?

A. Yes, sir; we were all down there together.

Q. All went down together?

A. Yes, sir; as far as I can remember.

Q. Do you remember who first went down in the cabin?

A. No, sir; I can't remember that.

Q. Did Andersen go down first?

A. I believe so; I can't tell for certain; I believe.

Q. Was there any force or compulsion against you to go into that cabin?

A. To take that drink?

239 Q. Yes.

A. He invited us to come down; says, "Come down, boys, I will give you a drink."

Q. You all went?

A. Yes, sir.

Q. Went voluntarily?

A. We went down on that.

Q. You were forced to do everything else aboard that boat except take that drink, and that you did by yourselves?

A. Not by myself.

Q. Of your own accord?

A. Wouldn't have done that if he didn't tell us to go down.

Q. Well, let me ask you something else. Who had charge of the port watch?

A. Mr. Saunders was in charge of that.

Mr. White. Is that rebuttal?

The Court. I don't think it is, but I would let him recall the witness to ask him.

Mr. White. Make him your witness in doing it, that's all.

Mr. McIntosh. I will make him my witness to that extent.

Q. In other words, wasn't that man Horsburgh, here, the engineer, doing second mate's duty?

A. He was not second mate. He was doing the work around deck.

Q. Wasn't he in charge of the starboard watch?

A. That I couldn't tell; I was not in that watch.

240 Q. Don't you know the fact this man Horsburgh was in charge of the starboard watch and doing second mate's duty on board that ship?

Mr. White. He says he don't know, and you are asking him over again.

Mr. McIntosh. You don't know who was in charge of the starboard watch?

A. The captain was in charge of that watch himself.

Q. The captain did not keep any watch. Wasn't this man acting second mate, and wasn't he in charge of that watch?

A. That I couldn't tell you.

Q. You don't know that?

A. No, sir; he was on deck at the time, but whether he was in charge of the watch I can't tell.

Q. Whether he was in charge of the watch you don't know?

A. No, sir.

241 Juan De Dios Barrial, recalled on behalf of the prosecution in rebuttal:

Examined by Mr. White:

Q. Barrial, the cook has said here that when he saw you first in the prison at Bahia you were very much distressed, and he asked you why you were arrested, and you said the boat gave you away. Did you tell him any such thing as that?

A. The boat?

Q. Yes.

A. Gave me away?

Q. Yes.

A. He says "What make you give yourself up?" he says to me. I said "My clear conscience. I ain't done nothing, God and you know, and I got no business to run away for my life for you or anybody."

Q. Then did you tell him that the boat gave you away, meaning that it was something about the boat which led to your being arrested?

A. No, sir.

Q. Is it true that you reported this occurrence on board the vessel to the authorities, and had telegrams sent to Bahia to cause the arrest of Anderson?

A. It is God's truth; that is how they found out, and I gave myself up.

242 Q. What did you want to do?

A. I went to a small place and asked for the head man of the place.

Q. It is not true, then, you told him you were arrested because the boat gave you away?

A. It is not true, sir.

Q. He has stated that you had your arms around his neck when he told you to put him in irons if you wanted to on board the ship. Is that true?

A. It is not true, sir. I put my hands because he looked at me. One thing scared me on board the ship was that man. He looked right straight in my face as if he was talking only to me, and I says "No, no, cook," and I touched him like this. I says "No, no; I no put in irons," because I tried to be kindly to him; want him to trust all of us and throw his revolvers away.

Q. You wanted him to trust you and throw his revolvers away?

A. Yes; I thought if we were kind to him he would trust us and throw his revolver away. I know the co'st; I have been sailing on it a long time, and see the sky as nice and clean now and the next moment there would be a squall. It is too far away from the shore. We might reach it out all right in the boat.

243 Q. You told him you can't get safely to shore in that small boat?

A. Yes, sir.

Q. He says he didn't suggest that the boat be burned, but objected to it being burned, and you all insisted on the burning of the boat. Is that true or not?

A. One word from that man the vessel would be saved. He has charge of the vessel; he has charge of it, and the balance were on board the vessel like chickens.

Q. He says he did not call you men out of the forecastle after the mate was shot and say he was in charge of the vessel. Is that true or not?

A. It is God's truth. He called us, "I am in charge of the vessel, come out here; come out here, I am in charge of the vessel," he says.

Q. "Come out of there, come out of there, I am in charge of the vessel;" he said that and repeated it?

A. Yes, sir; and I says yes, "Yes, cook, we get out. Let us dress ourselves."

Q. He says he didn't order you to throw the body of the mate overboard, but you did it of your own accord.

A. My God! The first time I went on top of the forecastle head he was here and ordered us to throw the body overboard, and he says you are the men to work. I says, "Don't, cook; don't, cook, I says; don't throw the body overboard, he is alive," and you heard such words from
244 him as I never heard before. As the mate went right on top of the rail he says, "Go on, you brute, I wish you were in hell;" the last word he says as the body went over the rail. That is God's truth, sir.

Q. Did you hear what John Linn said when he came to the forecastle window?

A. Yes, sir.

Q. What did he say?

A. He says, "Look out, boys, the cook is on deck with two revolvers." I says, "Where is the captain?" and he says, "In the cabin." I says, "He killed the captain;" and he says, "I don't know, but I guess he wants to kill the mate," or some words nothing less and nothing more.

Q. He says, "Look out, the co'k is on deck with pistols?"
A. Yes, sir.
Q. When you went back into the cabin after the captain's body, who ordered you to go back?
A. Just as the captain went over the rail he turned around and says, "Come on, boys, I give you drink now."
Q. He says he did not order you to go aft and throw the body of the captain overboard. He says he asked you, but didn't order you.
A. He says, "Come aft and take that brute up;" and I passed by my watchman, and I says, "Andrew, watch the chance if we can take hold of the cook;" and "Yes," he says, and we went down the cabin.
Q. Then he did order you to go down there and throw the
245 body overboard?
A. Yes, sir.
Q. When you got there how was the captain's body sitting in the chair?
A. The same as I am here, sir [illustrating].
Q. With his hands on his knees?
A. Yes, sir.
Q. Did you see anything like a beer bottle in either of his hands?
A. I didn't saw nothing on the floor.
Q. Did you see anything on the floor?
A. I didn't saw nothing.
Q. Any glass?
A. I didn't saw nothing.

Cross-examination by Mr. McIntosh:

Q. *Q.* You say John Linn came to the forecastle and sung out *out* in there, "Look out, the cook is on deck with two revolvers?"
A. Yes, sir.
Q. That he has killed the captain and killed the mate too?
A. No, sir; I never said such a thing.
Q. What did he say?
A. He says, "Look out, the cook is on deck with two revolvers." And I asked him, says Linn, "Where is the captain?" He
246 says, "In the cabin." I says, "Is he killed?" And he says, "I don't know, I guess so, and he now try to kill the mate." Just in the same words I heard the report of the shots.
Q. Now, you say this man Anderson commanded you to go down there and throw the captain overboard?
A. Yes, sir.
Q. He commanded you?
A. Yes, sir.
Q. Did you take any orders from him?
A. Yes, sir.
Q. Who was in charge of your watch?
A. The captain—no, sir.
Q. Who had charge of the watch?
A. The captain was in our watch.
Q. Well, now, but wasn't this man Horsburgh in charge of the watch?
A. No, sir.

Q. Wasn't he the second mate?
A. No, sir.
Q. Wasn't he doing second mate's duty on there?
A. I told you how the thing was.
Q. Well, tell us how it was.
A. The captain say he was second mate. I did not know whether he was or not, but Horsburgh was on deck in our watch; but still I
247 did not receive orders from Horsburgh, but still he is like a second mate; lived aft in the cabin and everything.
Q. He was?
A. Yes, sir.
Q. He lived in the cabin like the second mate?
A. Yes, sir; but I do not know whether the engineer lives aft in the cabin or not.
Q. Didn't he do second mate's duty?
A. Who?
Q. Horsburgh.
A. No, sir.
Q. He didn't?
A. No, sir; the captain says to me—he went down below night-time, he would turn to me, or, if I was at the wheel, he would tell another man, he says, "Horsburgh is too young, and if you see any squall or anything wrong in the watch you call me." "All right, sir." In the daytime the captain was on deck, and before he go down he give orders, you do this or that.
Q. You mean to say by all that that this man Horsburgh was not in charge of the port watch?
A. Yes, sir; was in charge. I respect him like the second mate.
Q. You respected him like you did the second mate?
A. I did, but still he never give me orders at all. I never
248 received orders from him. I received orders from the captain or mate.
Q. But you respected him as the second mate?
A. I respect anybody on board, sir.

Redirect examination by Mr. WHITE:

Q. Barrial, the cook says everybody in the boat when you were sailing for the shore was drunk, except you and himself?
A. He never reaches shore if he was to do that. The boat was half full of water all the time, and the rest of the crew was bailing away all the time steady night and day, besides one night that was squally weather, and them fellows had to set by the halyards and bailing water. They can't leave the water four or five minutes; bailing water all the time.
Q. Then it is not true that the other men were drunk, but they were bailing water all the time?
A. Yes, sir; them fellows bailing water steady all the time.

ANDREW MARCH, recalled on behalf of the prosecution in rebuttal.

Examined by Mr. WHITE:

Q. The cook has sworn here that he did not order you men to throw the mate's body overboard. Is that true or not?

A. That is not true. He ordered us.

249 Q. He has also said he did not call upon you men to come out of the forecastle, saying he was in charge of the ship. Is that true?

A. He ordered us out of the forecastle.

Q. Did he say he was in charge of the vessel?

A. Yes, sir.

Q. He says he did not order you to go aft and throw the captain's body overboard. Is that true?

A. He ordered us in the cabin to throw the captain's body overboard; yes, sir.

(Counsel for the accused here arose and objected to all this testimony on the ground that it was not rebuttal, stating that the witnesses have already testified to these facts on their direct examination, but the court overruled the objection and admitted the testimony.)

Q. When you got back to the aft cabin he says the captain had his right hand on the arm of the chair, and did not have both hands in his lap. How were the captain's hands?

A. Sitting like this, sir [illustrating].

Q. With his hands in his lap and his head thrown back. Did you see a beer bottle in there under the captain?

A. No, sir.

Q. Did you see any on the floor by him?

A. No, sir.

Q. Did you see any glass by him from which he could have

250 been drinking beer?

A. No, sir; I saw nothing like that.

Q. He says he did not *stand* over you with a pistol and make you set fire to the ship.

A. He did so, sir.

Q. State exactly what he did do in that particular connection.

A. I was down by the end of the deck load, and he was standing on top, with revolvers in his hand, and says to me, "Light that fire, and light it good."

Q. You were down in a passageway in the lumber?

A. Yes, sir.

Q. He says you men rifled the captain's quarters, and opened the the drawers, and took out things, and all sort of thing.

A. I never saw any man open any drawers in the captain's room, sir, but the cook.

Q. Did you see him open any drawers?

A. I saw him pull out one drawer with the cartridges in it.

Q. He says that Barstead was very drunk, and staggering about the deck. Is that true?

A. No, sir; that is not true. I did not see him drunk.

Q. He says after you left the vessel in the sailboat that all the men in it were drunk, except he and the Spaniard, and he could not get you to do any work. Is that true?

251 A. No, sir; that is not true, because it took one man all the time to bail the boat—shifted from one to the other all the time. The boat was very leaky.

Cross-examination by Mr. McIntosh:

Q. You say he stood over you when you fired the ship and made you fire her?

A. Yes, he stood over me.

Q. Did anybody else fire her except you?

A. I do not know who fired her aft.

Q. Somebody fired her aft?

A. I don't answer for anything I don't know.

Q. But you know somebody did fire her aft?

A. I know somebody did fire her aft.

Q. Now did he stand over that man too?

A. I do not know whether he stood over that man. He stood over me.

Q. While he was standing over you who stood over the man aft and made him fire her, do you know?

A. She was light before she was lighted forward.

Q. Don't you know the fact Hosburgh did fire the boat aft?

A. I do not know any such thing. I do not know who fired the boat aft.

Q. All you know is this man stood over you with a revolver
252 and made you fire her?

A. Yes, sir.

Q. Who brought the rags there to fire her?

A. Where?

Q. Where you were.

A. There were no rags brought there.

Q. How was it fired?

A. Kerosene oil poured over the deck load.

Q. And you touched that off?

A. Yes, sir.

Q. You did not have any rags or straw or anything like that?

A. There wasn't any rags or straw there.

Q. You just set off the planks, the wood where the kerosene oil was thrown on it, and touched it off with a match?

A. Yes, sir.

Q. Did you touch it off with a match?

A. Yes, sir; I touched it off with a match.

Q. Was he standing over anybody forward when the boat was fired—forward or aft?

A. No, sir; I did not see him fire the boat aft. I do not know who fired the boat aft.

Q. Didn't you leave the engineer in the hatch when you went forward?

A. The engineer was in the booby hatch when I went forward.

253 Q. Wasn't she fired in the booby hatch?

A. She was fired in the booby hatch, but wasn't fired when I went forward.

Martin Barstead, recalled on behalf of the prosecution in rebuttal:

Examined by Mr. White:

Q. The cook says you got drunk on the day of the 6th of August after the mate and captain's bodies were thrown overboard. Is that true?

A. No, sir.

Q. He says you stole whiskey.

A. No, sir; I did nothing of the kind.

Q. He says you and all the others were drunk on the sailboat going ashore except he and the Spaniard. Is that true?

A. No, sir; that is not true either.

Q. He says you did not see him from the wheelhouse when he shot the mate, because there was a boat on the roof of the after cabin between the two skylights which kept you from seeing. Is that true?

A. No, sir; that did not keep me from seeing.

Q. If the boat had been there it would not have kept you from seeing on the left-hand side of the vessel?

254 A. No, sir; I could see just the same. The boat was laying just there [pointing to the picture], but I could see over the boat.

Q. He says he did not keep any of you men from carrying anything you wanted to carry with you. Did he make you throw away any of your property?

A. Yes, sir; he did.

Q. What did he make you throw away?

A. He told me you need not carry your bank books or discharges ashore.

Q. Did he say why you need not do it?

A. You mustn't carry them ashore with you.

Q. Did he tell you why you mustn't carry them ashore?

A. Yes, sir; if you get caught if you do anything like that.

Q. Did he make you throw overboard anything you had?

A. No, sir; I left it in the vessel.

Q. When you were in the boat going ashore did you throw anything overboard?

A. Yes, sir; a photograph and three discharges.

Q. He made you throw them overboard?

A. He made me tear up the photographs and discharges and throw them overboard.

Cross-examination by Mr. McIntosh:

255 Q. About that pilot house. How high is that above the cabin roof?

A. About two feet eight inches; something like that——

Q. Where was that boat?

A. All of three feet, I guess. It was four steps.

Q. How high is the boat?

A. The boat is about—a small little boat—about two feet, I guess; a very little jolly boat they call it.

Q. A yawl boat?

A. Yes, sir.

Q. About two feet deep?

A. Yes, sir.

Q. Was laid crossways on the cabin?

A. Yes, sir.

Q. Bottom up?

A. Bottom up.

Q. And she was only two feet deep, and you say that was *was* three feet high?

A. Yes, sir; that about; wasn't longer than about two feet clear on each side of the house.

Q. Two feet on each side of the house?

A. Yes, sir.

By Mr. WHITE:

Q. The boat did not come clear across above the cabin of the house?

A. No, sir; I guess two feet clear on each side.

256 Q. Two feet clear on each side of the roof of that aft house?

A. Yes, sir.

Q. And you had ample space to see from where you stood on the left-hand side of the ship?

A. Yes, sir.

By Mr. MCINTOSH:

Q. Didn't it come clear across the width of the wheelhouse? It might not have come clean across the width of the captain's room; but didn't it come clean across the wheelhouse?

A. It might have come across the house. But still I seen it as good as I could see any gentleman in this room. There was nothing to stop me from seeing it.

JOHN J. MCCARTHY, on behalf of the prosecution in rebuttal, sworn.

Examined by Mr. WHITE:

Q. What is your occupation?

A. Police officer in Boston.

Q. Are you a member of the Boston Harbor police?

A. Yes, sir.

Q. How many years have you been holding that position?

A. About eight years. I have been in the department twelve years altogether.

257 Q. The accused, John Anderson, have you ever seen him before?

A. Yes, sir.

Q. Where did you see him?

A. On board the schooner "Olive Pecker."

Q. When?

A. On the 18th of June of this year.

Q. He says he did not tell you then and there that William Hosburgh, the engineer, had shipped only as engineer, and that the captain had no right to make him serve as second mate. Is that true or not?

A. It is not.

Q. What did he tell you?

A. We were aboard the vessel, and he brought Officer Etheredge and I in the cabin and showed us the articles.

Q. The cook carried you and Mr. Etheredge, another officer, and showed you the ship's articles?

A. Yes, sir; and pointed to Hosburgh's name and says he shipped on board this vessel as engineer, and they can't compel him to act as second mate?

Q. Did he say he had told the engineer that fact?
A. No, sir; he didn't say that.
Q. Was the captain on board?
A. No, sir; he was ashore at that time in our boat with Officer Russel.

258 Q. And the cook took you there and showed you the articles, and showed you Hosburgh's name where he had shipped as engineer, and said they could not make him ship as second mate?

A. Yes, sir.
Q. Was Mr. Etheredge present when that took place?
A. Yes, sir.

PETER C. ETHERIDGE, on behalf of the prosecution in rebuttal, sworn.

Examined by Mr. WHITE:

Q. Where do you live?
A. Boston.
Q. What is your occupation there?
A. Boston police.
Q. Are you connected specially with the harbor police of that city?
A. Yes, sir.
Q. Have you ever seen the accused, John Anderson?
A. Yes, sir.
Q. Where was he?
A. Aboard the "Olive Pecker."
Q. When?
A. 18th June, this year.

259 Q. He says he did not tell you and Officer McCarthy that Engineer Hosburgh had shipped simply as engineer, and could not be made to serve as second mate. Is that true or not?

A. It is not true.
Q. What did he tell you?
A. The exact words he used was, it was a shame to make a young fellow go as second mate when he only signed as engineer, and they couldn't compel him to go as second mate.
Q. Did he show you the articles?
A. He pointed out the articles in the cabin, and pointed out Hosburgh's name.
Q. The captain wasn't aboard at that time?
A. No, sir.
Mr. MCINTOSH. He showed you the articles?
A. Yes, sir.

By the COURT:

Q. How came he to be talking to you on that subject?
A. We were called aboard the schooner through some previous trouble, and were aboard while the captain had gone ashore in our boat.
Q. Making an investigation?
A. We were in the galley talking to the steward while the captain had gone ashore in our patrol boat.

JOHN G. MARINER, on behalf of the prosecution in rebuttal, sworn:

Examined by Mr. WHITE:

260 Did you ever see the accused, John Anderson, before?

A. Yes, sir.

Q. It has been testified to here that his character for soberness and peacefulness was good. Is it a fact or not—I will ask you first, do you know his character for soberness?

The question is objected to, and then the question is withdrawn.

Q. I asked you if you knew his reputation for soberness.

A. I have not seen him under the influence of liquor.

Q. Did you ever go with him, at his request, to have him take the pledge of temperance?

A. No, sir; I took him through my request last February.

By the COURT:

Q. Where was this you say you met him?

A. In Boston.

Q. When was it?

A. Some time in February—along from the 1st to the 26th.

Q. February of this year?

A. February of this year. I shipped him on the 26th in a vessel.

By Mr. WHITE:

Q. You are a shipping commissioner?

A. Yes, sir; 19 years.

261 Cross-examination by Mr. MCINTOSH:

Q. You shipped him on what?

A. I shipped him on the schooner "Harriet C. Kirlin."

Q. Haven't you ever shipped him before?

A. I shipped him in '66—somewhere near '66.

Q. Haven't you shipped him off and on for the last nine or ten years?

A. Those are the only two vessels I remember. He was in another vessel, but whether I shipped him before or not I do not know. It may have been my partner.

By the COURT:

Q. What year did you say?

A. In '66—somewhere in '66.

Q. '66?

A. '96 I mean.

By Mr. MCINTOSH:

Q. How did you happen to come to ask him to go and take the pledge?

A. There was a man there by the name of Mr. Murphy last February lecturing, and I went there at noon times, and Anderson was there most every day, and I asked him if he wouldn't come and hear the lecture and take the pledge.

Q. In other words, you wanted him to take the temperance pledge?

262 A. Yes, sir.

Q. Did he take it?
A. No, sir.
Q. He would not take it?
A. I do not know whether he would, but he didn't.

By Mr. WHITE:

Q. You were summoned here both by the defendant and the accused, were you not?
A. Yes, sir.

JOHN C. WILLIAMS, on behalf of the prosecution in rebuttal, sworn:

Examined by Mr. WHITE:

Q. Please state where you are now living.
A. Washington, D. C.
Q. What is your occupation there?
A. I am newspaper correspondent, connected with the New York Herald.
Q. Did you have an interview with John Anderson on board the United States war vessel "Lancaster" about the 6th or 7th of last November in Hampton Roads?
A. I did.

Q. He says he told you——

263 Question objected to until it is ascertained under what conditions this interview was had.

Mr. WHITE. It is not a question of confession. It is a question of impeachment.

By the COURT:

I do not think it is material.
Q. Was it a voluntary statement?
A. So far as I know it was.
Q. You offered him no inducements?
A. No, sir.

By Mr. MCINTOSH:

Q. How did you obtain the interview?
A. Mr. Camp, representing the Boston Herald, and myself went to Hampton Roads, and went aboard the "Lancaster" in one of the ship's boats. We had a letter from the Secretary of the Navy authorizing the captain to allow us to see the prisoners in the presence of an officer. Such of the prisoners as we had time to see, being very much pressed for time, were brought into a room on the port side of the vessel by the master at arms, and a marine was present in the room, and also there was also present a commissioned officer of the ship, and the man talked——
Q. How did you open the ball, so to speak? How did you obtain the interview? What did you do?
A. We simply asked them if they would tell about the occurrences, and they told freely.

Counsel for the accused objected to the testimony on the ground

264 that at the time the statements were given the prisoner was in charge of the officers of the U. S. Government, some of whom

were present during the interview alluded to, and in the course of counsel's remarks he stated that possibly they had been told by the officer to talk.

By the COURT:

It appears now before the court that this was a free conversation on the part of the prisoners, and that the gentlemen who were there under such circumstances as the law recognizes as proper had an interview with them. It is not a confession. It is a conversation. I think you go a little too far when you say they were told by an officer to talk.

Mr. MCINTOSH. I beg pardon. I did not mean to misstate it. How was that fact, Mr. Williams?

A. They were not told by an officer to talk, and I am sure no officer spoke to them when they were brought into the room. The officer was simply present in the room; wasn't paying attention to the conversation much of the time. Sometimes it was one officer, and sometimes another.

By the COURT:

They were simply asked a question and they willingly answered it. They could have declined to talk. I think the testimony is proper, and can be offered for what it is worth.

By Mr. WHITE:

Q. On the occasion on board that vessel, Mr. Williams, the accused says you stated to him that you knew where he got the pistols. Did you make any such statement as that?

A. No, sir; I did not.

265 Q. Did he say to you, "I saw he [alluding to the captain] was in a bad humor, and that he was going to kill him. I knew he had some pistols in his bunk, and went to get one of them."

A. That is the substance of what he said. It was condensed somewhat from his own language. As I said at the introduction of the article, this is Anderson's story in substance.

Q. You do remember he told you he got the pistol with which he killed the captain out of the captain's bunk?

A. That is my understanding of what he said.

Q. You did not tell him you knew where he got the pistols?

A. No, sir.

By Mr. MCINTOSH:

Q. Did anybody else there tell him they knew where he got the gun?

A. Not to my knowledge. I am quite certain no one else did.

By the COURT:

Q. Were they all talking together, Mr. Williams, or one at a time?

A. One at a time.

By Mr. MCINTOSH:

Q. You took them seriatum?

A. As we were much pressed for time, we first asked for the man who could tell the best story of the whole occurrence, and we saw the Spaniard, as the master at arms said he was the man who could tell

the best story, and then we saw Anderson. Those are the only
266 two we saw. There was present a young man from Norfolk, I think named Griggs, in addition to Mr. Camp and myself. Mr. Camp and I went together.

Thereupon, the case being closed, the accused, by his counsel, asked the court to charge the jury, as follows:

No. 1.

The court instructs the jury that if they believe from the evidence that the deceased was armed with a deadly weapon or an instrument, an implement of his trade, which could be used as a deadly weapon, and at the time of the homicide was advancing upon the prisoner in a threatening attitude and in such a manner as to induce the prisoner to believe that his life or limb were in great jeopardy and danger, and that the prisoner was under a reasonable apprehension that such was the case, and that the prisoner in order to avoid and to ward off such peril to his life and limb, or body, fired upon the deceased as he was advancing upon him in such threatening manner or attitude, and that in this manner
267 killed the deceased, the prisoner is not guilty of murder or of any other offense punishable under this indictment, and that the jury should acquit the prisoner of any offense whatever.

No. 2.

The court instructs the jury that if they believe from the evidence that the prisoner was in deadly fear of life or limb on the occasion of the homicide, and that fear was induced by the brutal and inhuman treatment of the deceased as his superior officer, and as such having command and authority over him, and that in the bona fide and honest belief that the deceased was about to inflict great bodily harm upon him, and that his life was in jeopardy at the hands of the deceased, and that such fear and apprehension was induced by the conduct and bearing of the deceased towards him, then the jury are instructed that they should acquit the prisoner of the charge in the indictment.

No. 3.

The court further instructs the jury that if they believe from the evidence that the homicide charged in the indictment was committed by the prisoner without malice aforethought, but was the result of a
268 sudden heat of blood, and not from any deliberate purpose to kill the deceased or to do him any bodily harm, then the jury are instructed that they should not find the prisoner guilty of murder, but should find him guilty of manslaughter.

No. 4.

The court further instructs the jury that if upon a fair and deliberate consideration of all the evidence in this case there is any rational hypothesis consistent with the conclusion that the homicide for which the prisoner is being tried was excusable or justifiable the prisoner can not be convicted.

No. 5.

The court instructs the jury that the right of self-defense is founded upon the law of nature, which confers upon every man the right to defend his person by those means which are necessary to attain this object, and the court therefore instructs the jury that if they believe, from the evidence, that the deceased on the occasion of the homicide was a superior officer in command and having authority over the prisoner and so
269 demeaned himself to the prisoner as to terrorize him and under such circumstances the prisoner, being bereft of his proper senses fired upon the deceased and killed him, then the jury should find him "Not guilty."

No. 6.

The court instructs the jury that every man who stands indicted is presumed to be innocent until his guilt is fully and legally proven by the evidence, and that any mere preponderance of evidence is insufficient to convict unless upon all the evidence in the case and he is proven guilty beyond any reasonable doubt.

No. 7.

The court instructs the jury that if they believe from the evidence, that the deceased did not come to his death by drowning, as set forth in the indictment, but by some other means not of a like character or species of that so described, but that at the time of his being cast into the water he was dead, then they can not find the prisoner guilty under this indictment.

And the United States, through its attorney, thereupon asked the court to charge the jury as follows:

270 GENTLEMEN OF THE JURY: The court instructs you as follows:

The indictment in this case charges the defendant, John Andersen, alias John Anderson, with murder on the high seas, in violation of §5339, Revised Statutes of the United States, as amended by the act of Jan. 15, 1897. Section 5339 provides that any person who commits murder on the high seas, out of the jurisdiction of any particular State and within the admiralty and maritime jurisdiction of the United States, shall suffer death, unless the jury see fit to qualify their verdict by the statement "Without capital punishment."

The accused in this case, under the law, is presumed to be innocent until he is proven guilty by evidence which excludes any reasonable doubt of his guilt. It is incumbent upon the Government to show, first, that the offense alleged in the indictment occurred on board of an American vessel; second, while on the high seas, outside of the jurisdiction of any particular State of the United States; and, third, that the deceased, William Wallace Saunders, sometimes called William Saunders, was premeditatedly killed by the accused.

There is no denial in this case of the fact that the deceased was
271 killed on board of the "Olive Pecker," on the high seas, out of the jurisdiction of any particular State of the United States, and by the accused. Your inquiry, therefore, is very limited; indeed, your sole inquiry is whether the evidence shows that the killing, which is admitted by the accused, was a wilful, deliberate, and premeditated killing.

To constitute a wilful, deliberate, and premeditated killing it is not necessary that the intention to kill should exist for any particular length of time. It may spring up in an instant, and may be inferred from the use of a deadly weapon and also from the fact of the killing itself. If, therefore, you believe from the evidence that the accused armed himself with a pistol or pistols and left the cabin of the vessel "Olive Pecker" and went in search of the mate for the purpose of having a difficulty, and that he did call the deceased from the rigging of the vessel, where he was at work, down to the deck, and that upon his coming down he did actually kill him by shooting him or causing him to be thrown into the sea, then such killing was wilful and deliberate murder.

Mere words, or threats, or fear, or previous maltreatment, which have occurred sufficiently long before the killing as to allow a cooling space, will not justify one in killing another. If, therefore, you shall believe from the evidence that the deceased did curse and refuse to give
272 protection to the accused on the morning of the homicide, it will not excuse the accused for killing the deceased; nor will it be any palliation of such killing nor any justification therefor if, having so armed himself and gone in search of deceased, called him down from his place of work in the rigging, and shot him when he came down, that the deceased attempted to use a marlin' spike when he was so called down and confronted by the accused, armed with a pistol or pistols.

If you should believe or infer from the evidence that there had been difficulties between the accused and the captain of the vessel, that would neither excuse nor palliate the shooting of the mate by the accused, and should not be considered by you.

Under the circumstances, therefore, of this case, the court further instructs you that if you believe from the evidence that the accused did arm himself with a pistol or pistols, leave the cabin of the vessel, go out on her deck in search of the mate, call him down from his work for the purpose of a difficulty, and then shoot and kill him, then there is nothing in the evidence to reduce such killing from murder to manslaughter. For that reason it is not necessary to instruct you on the subject of the law as to manslaughter. Manslaughter is killing without delib-
273 eration, and therefore without malice, either express or implied.

If you believe, therefore, from the evidence that a felonious homicide was committed, your verdict should be, "We, the jury, find the prisoner guilty as charged in the indictment;" or you may, if you think the nature of the case justifies it, qualify such verdict by saying "without capital punishment."

The court, having heard argument in behalf both of the accused and the Government, took time to consider. Upon returning into court, it announced that the instructions asked for by the accused, as well as those asked for by the Government, were rejected, except in so far as the same were included in the general charge to be given to the jury, both sets of said instructions being endorsed by the court as follows:

"Except as this instruction, asked for (by the accused and the United States, respectively), is included in the charge given by the court to the jury, the same is rejected.

"NATHAN GOFF, *Circuit Judge.*
"RO. W. HUGHES, *District Judge.*"

To which ruling of the court, in refusing to grant the instructions asked for by the prisoner, the prisoner, through his counsel, excepted.

274 Thereupon the court proceeded to charge the jury as follows:

"GENTLEMEN OF THE JURY: The indictment you will now consider charges the prisoner, John Anderson, alias John Andersen, with murder, and is drawn under the provisions of § 5339 of the Revised Statutes of the United States, which reads as follows:

"'Every person who commits murder—

"'First. Within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States.

"'Second. Or upon the high seas, or in any arm of the sea, or in any river, harbor, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State.

"'Third. Or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death.'

"The indictment in substance charges that John Anderson, on the sixth day of August, 1897, on the vessel 'Olive Pecker,' when it was

275 on the high seas, and within the admiralty jurisdiction of the United States and out of the jurisdiction of any particular State of the United States, did kill and murder one William Wallace Saunders the mate of said vessel.

"Before you can return a verdict of guilty against the defendant you must first find from the evidence that the said mentioned William Wallace Saunders is dead, and that he came to his death on the high seas in the manner set forth in the indictment; that he was at the time of his death the mate of the 'Olive Pecker,' and that he was killed, as charged in said indictment, by the defendant, John Anderson. You must also find from the evidence that the 'Olive Pecker' was an American vessel, and that the eastern district of Virginia, in the United States of America, is the district into which, in the United States, the defendant was first brought after the killing of said Saunders.

"If you find these facts to be as charged in the indictment, you must then find if the killing of Saunders was murder. Under the laws of the United States there are two kinds of felonious homicide—murder and manslaughter. Murder is not defined by any statute of the United States, and we therefore go to the common law and find that it is the unlawful killing of a human being in the peace of the State, with malice

276 aforethought, such malice being either expressed or implied.

"It follows then, gentlemen of the jury, that malice is an essential element in the crime of murder, discriminating it from manslaughter. Malice is express when one, by premeditation and design, deliberately formed in advance, kills another, the premeditation and design being shown by proof, such as testimony showing previous threats, lying in wait, preparation for the killing, hatred of and concerted schemes against the victim.

"Implied malice is the simple and natural inference of the law from any deliberate and cruel act committed by one person against another.

"The other felonious homicide to which I called your attention—manslaughter—is the unlawful killing of a human being without malice, either express or implied. I fin*g* it to be my duty, gentlemen of the jury, to say to you that if the defendant has committed a felonious homicide—of which you are the only judges—there is nothing before you that reduces it below the grade of murder.

"The law presumes that the defendant is innocent, and he is entitled to this presumption in his favor until you are satisfied from the evidence, beyond a reasonable doubt, that he is guilty; and therefore you
277 should give him the benefit of this presumption of innocence and acquit him, unless his guilt is established beyond a reasonable doubt, in which event you should convict him.

"A reasonable doubt is stated by our courts of final resort as being that state of mind which, after a full consideration of all the evidence, leaves the minds of the jurors in such condition that they can not say they feel an abiding faith amounting to a moral certainty, from the evidence, that the defendant is guilty of the crime with which he is charged. You are further instructed, gentlemen of the jury, that if, upon a fair and reasonable consideration of all the evidence in this case, there is any rational hypothesis consistent with the conclusion that the homicide for which the defendant is being tried was excusable or justifiable, he can not be convicted.

"Gentlemen of the jury, you are the sole, the exclusive judges of the facts, and also of the credibility of the witnesses. In judging of their credibility you have the right to take into consideration their motives, their prejudices, their feelings of enmity, and their desires for revenge, if any such motives, prejudices, enmity, and desire for revenge has been shown to exist by the evidence before you. You can also consider
278 the demeanor of the witness—his manner of testifying—his relation to or his connection with the matter to which his evidence refers, and if you find from the evidence that he has wilfully testified falsely as to any material fact you may then disregard entirely his testimony.

"Gentlemen of the jury, should you find the defendant guilty of murder, and not intend that the judgment of the court shall be death, you will add to your verdict the words 'Without capital punishment,' in which event the defendant will be sentenced to imprisonment at hard labor for life. Therefore if you find the defendant guilty of murder, and also find that he shall suffer death, your verdict in form may be:

"'We, the jury, find the defendant, John Anderson, alias John Andersen, guilty of murder, as charged in the indictment.'

"But, if you should find him guilty of murder, and also find that he shall be punished by imprisonment at hard labor for life, your verdict in form may be:

"'We, the jury, find the defendant, John Anderson, alias John Andersen, guilty of murder as charged in the indictment, without capital punishment.'

"And if you shall find him not guilty, your verdict in form may be:

"'We, the jury, find the defendant, John Anderson, alias John Andersen, not guilty.'"

279 To which charge to the jury the accused, by his counsel, excepted.

The argument was thereupon had before the jury by the United States, through its attorney, Wm. H. White, and by the accused, through his counsel, Geo. McIntosh, esq., and the jury, upon the conclusion of such argument, retired to their room for deliberation, and after a time returned into court and rendered the following verdict, to wit:

"We, the jury, find the defendant, John Andersen, alias John Anderson, guilty of murder, as charged in the indictment.

"B. F. Rosson, *Foreman.*"

Thereupon, the accused, by his counsel, moved the court to set aside the said verdict and grant him a new trial on the grounds stated in the following motion:

Defendant's motion for a new trial.

The prisoner moves the court to set aside the verdict rendered in this case and to grant him a new trial, and hereby assigns the following grounds therefor:

1. That the court erred when it refused to quash the writ of venire facias in this case for the petit jury, upon a motion to that effect
280 on the ground that the said writ did not show the purpose for which the said venire was summoned.

That it did not show that the said venire was summoned for the purpose of the trial of the indictment against the said Anderson. (P. 10, being original; p. 28 of this record.)

2. That the witness, A. J. Hall, was permitted to testify in answer to certain hypothetical questions propounded to him, which questions were based on the condition of the deck load of the schooner at the time of the homicide, whereas such conditions were never proven to have existed, and the evidence was not struck out as asked by the defendant's motion to that effect, the witness having subsequently stated that he knew nothing of the condition of the structure of the deck-load of the said vessel at the time of the homicide. (P. 15–18, being original; p. 33–36 of this record.)

3. That the court erred in ruling out the question propounded upon cross-examination by the prisoner's attorney to the witness John Lind: "Do you know of any other circumstances—had this captain been brutal or inhuman to the cook in any other way?" it being the object of said question to show that the said Anderson had been cruelly and inhumanly beaten by the said mate and by the captain of the vessel, and that he stood in bodily fear for his life or great bodily danger to his person from both the captain and the mate. (P. 55, being original; p. 73 of this record.)

281 4. That the court erred in refusing to instruct the jury to bring in a verdict of "not guilty" under the indictment when the Government closed and rested its case, the indictment charging murder by drowning, and the entire evidence offered by the Government being that the deceased came to his death by wounds received by shooting, and that only. (P. 116 being original. P. 133 of this record.)

5. That the court erred in not permitting the defendant when upon the witness stand to answer the question: "Now, I want to ask this

question to the witness. I want you to detail with truth to the jury everything which occurred in reference to this business from the time you shipped on the 16th day of June until you left the vessel on the 6th day of August," but confining the witness to what took place there on the morning of the day of the alleged homicide. (P. 120 being original. P. 137 of this record.)

6. That the court erred in not permitting the defendant when upon the witness stand to answer the question: "Now state to the jury all that occurred between you and the mate during that time" (meaning since June, 1897, as indicated by the preceding question) "including all the facts and circumstances attending the 6th of August," intending thereby to show the cruel and inhuman treatment of the prisoner by the said mate and the attempt on the part of the said mate to throw the said accused overboard without provocation. (P. 122 being original. P. 139 of this record.)

282 7. That the court erred in not permitting the defendant when upon the witness stand to answer the question: "Now state what trouble, if any, you had with this mate previous to this occasion," intending thereby to show that the mate had previously, without provocation, attempted to cast the accused into the sea and thereby to drown him. (P. 141 being original. P. 158 of this record.)

8. That the court erred in not permitting the defendant when upon the witness stand to answer the question: "The question is, whether on the day before" (meaning the day before the 6th of August, 1897—the day of the homicide) "this man had a difficulty with the mate, and without provocation on his (Anderson's) part the mate had not attempted to throw him overboard."

The defendant meaning and intending to prove by the said question that the said mate had so acted. (P. 144 being original. P. 161 of this record.)

9. That the court erred in rejecting the testimony of the witness John Darnhardt when asked as to the general reputation of John W. Whitman, the captain of the schooner "Olive Pecker." (P. 208 being original. P. 225 of this record.)

10. The court erred in refusing to instruct the jury as set out on p. 249, etc., of original. (P. 266 of this record.)

(*a*) The court instructs the jury that, if they believe from
283 the evidence that the deceased was armed with a deadly weapon or an instrument, an implement of his trade, which could be used as a deadly weapon, and at the time of the homicide was advancing upon the prisoner in a threatening attitude and in such a manner as to induce the prisoner to believe that his life or limb were in great jeopardy and danger, and that the prisoner was under a reasonable apprehension that such was the case, and that the prisoner, in order to avoid and to ward off such peril to his life and limb or body, fired upon the deceased as he was advancing upon him in such threatening manner or attitude, and that in this manner killed the deceased, the prisoner is not guilty of murder or of any offense punishable under this indictment, and that the jury should acquit the prisoner of any offense whatsoever.

(*b*) The court instructs the jury that, if they believe from the evidence that the prisoner was in deadly fear of life or limb on the occasion

of the homicide, and that fear was induced by the brutal and inhuman treatment of the deceased, as his superior officer, and as such having command and authority over him, and that in the bona fide and honest belief that the deceased was about to inflict great bodily harm upon him, and that his life was in jeopardy at the hands of the deceased, and that such fear and apprehension was induced by the conduct and
284 bearing of the deceased towards him, then the jury are instructed that they should acquit the prisoner of the charge in the indictment.

(*c*) The court further instructs the jury that, if they believe from the evidence that the homicide charged in the indictment was committed by the prisoner without malice aforethought, but was the result of a sudden heat of blood and not from any deliberate purpose to kill the deceased or to do him any bodily harm, then the jury are instructed that they should not find the prisoner guilty of murder, but should find him guilty of manslaughter.

(*d*) The court further instructs the jury that if, upon a fair and deliberate consideration of all the evidence in this case, there is any rational hypothesis consistent with the conclusion that the homicide for which the prisoner is being tried was excusable or justifiable, the prisoner can not be convicted.

(*e*) The court instructs the jury that the right of self-defense is founded upon the law of nature which confers upon every man the right to defend his person by those means which are necessary to attain this object, and the court therefore instructs the jury that if they believe from the evidence that the deceased on the occasion of the homicide was a superior officer in command and having authority over the
285 prisoner, and so demeaned himself to the prisoner as to terrorize him and under such circumstances the prisoner, being bereft of his proper senses, fired upon the deceased and killed him, then the jury should find him "Not guilty."

(*f*) The court instructs the jury that every man who stands indicted is presumed to be innocent until his guilt is fully and legally proven by the evidence, and that any mere preponderance of evidence is insufficient to convict, unless upon all the evidence in the case and he is proven guilty beyond any reasonable doubt.

(*g*) The court instructs the jury that, if they believe from the evidence, that the deceased did not come to his death by drowning, as set forth in the indictment, but by some other means not of a like character or species of that so described, but that at the time of his being cast into the water he was dead, then they can not find the prisoner guilty under this indictment.

JOHN ANDERSON,
By GEO. MCINTOSH, *His Counsel.*

286 On consideration whereof the court overruled the said motion for a new trial, saying:

(Judge GOFF). I do not find it necessary, in passing upon the motion for a new trial, to review, or at least very fully, the evidence offered in the case upon the special point counsel for the prisoner relies upon or presses at this particular time more so than the others. If there had

been any testimony at all in the case tending to show that the mate had made an attack upon the prisoner, there might be some ground for claiming that the excluded testimony should have been admitted. Now, I give the case very careful consideration, and I wish I could see it. If Andersen had not testified as he did it would have been different. I care not what words the witness may have used, Andersen's testimony goes to show that after he left the room of the captain, or as he left the room of the captain, he armed himself, and he stated from the witness stand himself, "Then I thought of the mate." If that is not the language, it is the substance of his testimony. He then went to hunt the mate, and I think that is the meaning of his testimony. He states himself that on his way he asked someone where the mate was. He knew that the mate was aloft. He went towards the mate with the guns in his hand. He does not deny; he admits that he spoke to the mate,
287 although he is not positive as to the language he used to the mate when the mate was aloft. At any rate, the mate came down. Andersen was standing before him, having sought him, according to his own testimony, with a pistol in his hand. Now, I do not think that the testimony shows that the mate came towards him with the marlin' pin in his hand; but even if he did, it was proper for the mate to do so, and it did not extenuate in the least the conduct of Andersen. On the contrary, instead of the mate advancing towards him in a threatening way, the testimony shows that the pin was around the mate's neck, and that he said, "For God's sake, cook, don't shoot me." These are not the words that fall ordinarily from the lips of a man who is advancing to attack another. I said before that I would be glad if I could see the testimony judicially, officially, in the discharge of my duty in that light, but I can not; we can not. I conclude that the motion for a new trial must be overruled.

To which ruling of the court the prisoner, by his counsel, excepted.

Thereupon the prisoner, by his counsel, moved the court for an arrest of judgment for the reasons stated in the written motion, which written motion is as follows:

Motion in arrest of judgment.

The prisoner moves the court to arrest the judgment and order
288 that a judgment of acquittal be entered in his favor, and that he be discharged from custody, and that the indictment herein be not further prosecuted for the reasons set forth in the prisoner's motion for a new trial filed in these proceedings, to which reference is hereby made.

On consideration whereof the court overruled the said motion in arrest of judgment, to which action of the court the prisoner, by his counsel, excepted. Thereupon, no reason being shown against it, the court proceeded to pronounce judgment against the accused as follows:

(To the prisoner): I pronounce upon you the judgment of the law, and it is that you be taken hence by the marshal of this district and confined in close custody in the Norfolk jail until Friday, the eighteenth day of March, 1898, and that you then be taken by the United States marshal in and for the eastern district of Virginia to some suitable place in the said district, and between the hours of two and six in the afternoon of

that day that you shall be hung by the neck until you shall be dead. The marshal will take the prisoner, and the district attorney will see that the sentence is executed.

And inasmuch as the several matters and things above referred
289 to and set out do not otherwise appear in the record, the defendant prays that this bill of exceptions, if found correct, may be signed and sealed by the court and made a part of this record.

JOHN ANDERSON,
By his attorney, GEORGE MCINTOSH.

The foregoing bill of exceptions is correct and is hereby signed, sealed, and made a part of the record.

NATHAN GOFF,
[SEAL.] *U. S. Circuit Judge, Eastern District of Virginia.*

(Endorsed:) Circuit court of the United States, eastern district of Virginia, November, 1897, session at Norfolk, Va. The United States *v.* John Anderse, alias John Anderson. Indictment. No. 241. Murder on high seas. Bill of exceptions of defendant. Filed January 12, 1898. H. S. Ackiss, deputy clerk.

290 *Affidavit of John Andersen, alias John Anderson.*

In the circuit court of the United States for the eastern district of Virginia.

THE UNITED STATES
vs. } Indicted for murder.
JOHN ANDERSON, ALIAS JOHN ANDERSEN.

The defendant, John Anderson, maketh oath that he is without means whatsoever and has no property, and that because of poverty he is unable to pay the cost of prosecuting his writ of error in the above-entitled suit.

JOHN ANDERSON.

Sworn and subscribed to before me this 7th day of January, 1898.

TAZEWELL TAYLOR HUBARD,
Notary Public for City of Norfolk, Va.

(Endorsed:) Filed Jan. 7, 1898. H. S. Ackiss, deputy clerk.

291 *Order to prepare record to U. S. Supreme Court.*

In the circuit court of the United States for the eastern district of Virginia.

THE UNITED STATES
vs. } Indicted for murder.
JOHN ANDERSON, ALIAS JOHN ANDERSEN.

On the 7th day of January, 1898, the defendant, John Anderson, alias John Andersen, filed an affidavit that because of poverty he is unable to pay the cost of prosecuting his writ of error. The court thereupon orders that the clerk of this court prepare the transcript of record for the

Supreme Court and all necessary papers on the prosecution of his writ of error without cost to the defendant.

NATHAN GOFF,
U. S. Circuit Judge.

JANUARY 10, 1898.

(Endorsed:) Filed Jan. 10, 1898. H. S. Ackiss, deputy clerk.

292 *Petition of John Andersen, alias John Anderson, for a writ of error.*

In the United States circuit court for the eastern district of Virginia.

THE UNITED STATES OF AMERICA, COMPLAINANT,
vs.
JOHN ANDERSON ALIAS JOHN ANDERSEN, DEFENDANT.

Petition of defendant, John Anderson, for an order allowing a writ of error.

John Anderson, the defendant in the above-entitled cause, feeling himself aggrieved by the verdict of the jury and the judgment entered on the 23rd day of December, 1897, in pursuance of said verdict, whereby it was ordered, adjudged, and decreed that the defendant be taken by the marshal/ of the eastern district of Virginia and confined in the jail of the city of Norfolk until the 18th day of March, 1898, and on which said day be by said marshal/ hung by the neck until he be dead, between the hours of 2 and 6 of said day, comes now by George McIntosh, his attorney, and petitions the court for an order allowing said defendant to prosecute a writ of error to the honorable Supreme Court of the United States,
293 under and according to the laws of the United States in that behalf made and provided, and that upon the allowance of the said writ of error all further proceedings in the said circuit court of the United States for the eastern district of Virginia be suspended and stayed until the determination of the said writ of error by the United States Supreme Court.

And your petitioner will ever pray.

GEORGE McINTOSH,
Attorney for John Anderson.

(Endorsed:) Filed Jan. 18, 1898. M. F. Pleasants, clerk.

Assignment of errors.

In the circuit court of the United States for the eastern district of Virginia.

JOHN ANDERSEN ALIAS JOHN ANDERSON, plaintiff in error,
vs.
THE UNITED STATES OF AMERICA, defendant in error.

Now comes John Andersen, the plaintiff in error herein, by George McIntosh, his attorney and counsel, particularly specifies the following as the errors upon which he will rely and which he will urge upon his writ of error in the above-entitled cause.

1. That the circuit court of the United States for the eastern district of Virginia erred in overruling the demurrer of the plaintiff in
294 error interposed to the indictment filed against him (see record, pages 7 & 27) on the ground:

(*a*) That the indictment does not specify the locality upon the high seas where the offense occurred.

(*b*) That the said indictment alleges the homicide to have been committed by shooting and drowning, which are means inconsistent in themselves and not of the same species, and therefore impossible to have occurred as alleged. (See record, pages 7 & 27.)

2. That the said court erred in overruling the motion of the plaintiff in error to quash the venire facias in this cause, which summoned the petit jury for the trial, upon the grounds that the said writ does not show that said venire was summoned for the trial of the indictment upon which the said defendant was to be tried. (See record, pages 28–9.)

3. That the said court erred in permitting the Government to ask a hypothetical question to the witness A. J. Hall, and in refusing to strike out the testimony of the said A. J. Hall upon the motion of the defendant when said A. J. Hall had stated in evidence that he did not know the condition of the load of the vessel at the time of the homicide. (See record, pages 34–5–6–7.)

4. That the said court erred in excluding the question, "Did you know of any other circumstances; had this captain been brutal or inhu-
295 mane to this cook in any other way?" (73 p. of the record) asked by the prisoner's counsel to the witness John Lind upon cross-examination.

5. That the said court erred in overruling the prisoner's motion (upon the resting of the Government's case) that the court should instruct the jury to bring in a verdict of "not guilty" upon the grounds that the indictment under which the prisoner is being tried alleges the mate Saunders met his death by drowning as a result of the casting of his body into the sea, whereas all the proof submitted by the Government was to the effect that he met his death at the hands of the said John Anderson and by a pistol discharged by the prisoner. (See pages 133–4 of the record.)

6. That the said court erred in not permitting the prisoner's counsel to ask the witness John Anderson, when upon the stand, the following question:

"Now, I want to ask this question: To the witness: I want you to detail with truth to the jury everything which occurred in reference to this business from the time you shipped, on the 16th of June, until you left the vessel, on the 6th of August," and in confining the witness to what took place on the morning of the day of the alleged homicide.

7. That the court erred in not permitting the prisoner's counsel to ask the witness the following question:

"Now, state to the jury all that occurred between you and the
296 mate during that time (meaning since June, 1897, as indicated by the preceding question), including all the facts and circumstances attending the 6th of August," intending thereby to show the cruel and inhumane treatment of the prisoner by the said mate and the attempt on the part of the said mate to throw the accused overboard without provocation.

8. That the said court erred in not permitting the prisoner's counsel to ask the witness John Andersen, when upon the stand, the following question:

"Now, state what trouble, if any, you had with this mate previous to this occasion?" (See record, pages 158–9–60, and to the ruling of the court on said question, page 160 of the record.)

9. That the said court erred in not permitting the prisoner, by counsel, to ask the witness John Andersen the following question:

"I want to ask you whether on the day before you had had a difficulty with the mate, and that without provocation on your part the mate had not attempted to throw you overboard?" (See page 163 of the record.)

10. That the said court erred in not permitting the prisoner, by his counsel, to ask the witness John Darnhardt the following question:

"Are you acquainted with his general reputation?" (See p. 225.)

297 11. That the court erred in refusing to give the instructions, numbers 1 to 7, asked by the prisoner's counsel to be given to the jury and in instructing the jury as set out in the record, and which charge was delivered to the jury. (See page 274 of the record.)

12. That the court especially erred in charging the jury as follows: "The other felonious homicide to which I call your attention—manslaughter—is the unlawful killing of a human being without malice either expressed or implied. I find it to be my duty, gentlemen of the jury, to say to you that if the defendant has committed felonious homicide, of which you are the only judges, there is nothing before you that reduces it below the grade of murder." (See page 276 of the record.)

13. That the court further erred in refusing to set aside the verdict and grant the prisoner a new trial for the reasons assigned and set forth in the defendant's motion therefor. (See pages 279–80–1–2–3–4–5.)

14. That the court erred in not arresting the judgment and ordering that a judgment of acquittal be entered in favor of the prisoner and in giving judgment against the prisoner, as set out in the record. (Pages 17 & 288.)

In order that the foregoing assignment of errors may be and appear of record, the plaintiff in error presents the same to the court, and

298 prays that such disposition be made thereof as is in accordance with law and the statutes of the United States in such cases made and provided, and prays an order that the judgment of the circuit court of the United States in and for the eastern district of Virginia be reversed and that he be granted a new trial herein.

JOHN ANDERSON,
By GEORGE McINTOSH, *His Counsel.*

(Endorsed:) Filed Jan. 18, 1898. M. F. Pleasants, clerk.

299 *Order allowing writ of error.*

At a stated term, to wit, the November term, A. D. 1897, of the circuit court of the United States of America of the fourth judicial circuit, in and for the eastern district of Virginia, held at the court room in the city of Norfolk, State of Virginia, on the fifth day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

Present, the Honorable Nathan Goff, circuit judge.

THE UNITED STATES OF AMERICA
vs.
JOHN ANDERSEN, ALIAS JOHN ANDERSON. } Indicted for murder. No. 241.

The defendant, John Andersen, having duly filed his petition for a writ of error to the United States Supreme Court, together with an assignment of errors, within due time, now, on motion of Geo. McIntosh, esq., counsel for the defendant, it is hereby ordered that the writ of error to the United States Supreme Court be granted said respondent, John Anderson, and that a certified transcript of the record and all proceedings in said cause be transmitted by the clerk of this court to the clerk of the Supreme Court of the United States, and that during the pendency of said writ of error all proceedings in this court herein shall be stayed until the determination of said writ of error in said Supreme Court of the United States.

NATHAN GOFF,
U. S. Circuit Judge.

300 (Endorsed:) United States vs. John Anderson. Order for writ of error & stay of proceedings. Filed Feb'y 5, 1898. H. S. Ackiss, D. C.

301 *Original.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Virginia, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you between John Andersen, defendant and plaintiff in error, and the United States, plaintiff and defendant in error, a manifest *of* error hath happened, to the great damage of the said John Andersen, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, District of Columbia, United States of America, on the seventh day of March next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and
302 custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fifth day of February, in the

year of our Lord one thousand eight hundred and ninety-eight and of the Independence of the United States the one hundred and twenty-second.

[SEAL.]

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States,
Eastern District of Virginia.

The above writ of error is hereby allowed.

NATHAN GOFF,
Judge of the Circuit Court of the United States
for the Eastern District of Virginia.

Service of the within writ of error and receipt of a copy thereof on this 10th day of Feb'y, A. D. 1898, is hereby admitted.

WM. H. WHITE,
U. S. District Attorney and Attorney for the
Defendant in Error and Complainant.

Marshal's return.

Executed Feb. 16th, 1898, by delivering to W. H. White, U. S. district attorney for eastern district of Virginia, in person, at his office, in Norfolk City, Va., a true copy of this writ.

Norfolk, Va., Feb. 10, '98.

J. M. HUDGIN,
U. S. Marshal.

By THOMAS H. CROSS,
Deputy Marshal.

303 *The answer of the judges of the circuit court of the United States of the fourth judicial circuit in and for the eastern district of Virginia.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States of America within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[SEAL.] M. F. PLEASANTS, *Clerk.*

(Indorsed): United States vs. John Anderson. Answer of judges to writ of error. Filed Feb'y 5, 1898. H. S. Ackiss, D. C.

304 UNITED STATES OF AMERICA, *ss:*

To United States of America, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 7th day of March, A. D. 1898, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Virginia, wherein John Andersen is plaintiff in error and you are defendant in error, to show cause, if

any there be, why the judgment in the said cause mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Nathan Goff, judge of the circuit court of the United States, fourt' circuit, eastern district of Virginia, this 5th day of February, A. D. 1898, and of the independence of the United States the one hundred and twenty-second.

NATHAN GOFF, *Judge.*

Service of within citation by copy admitted this 10th day of February, A. D. 1898.

WM. H. WHITE,
U. S. District Attorney, and
Attorney for Defendant in Error and Complainant.

304½ *Marshal's return.*

Executed Feb. 10th, 1898, by delivery to W. H. White, U. S. district attorney for eastern district of Virginia, in person, at his office in Norfolk City, Va. A true copy of this writ.

J. M. HUDGIN,
U. S. Marshal.

By THOMAS H. CROSS,
Deputy Marshal.

NORFOLK, VA., *Feb. 10, '98.*

305 *Clerk's certificate.*

In the circuit court of the United States, fourth judicial circuit, eastern district of Virginia.

THE UNITED STATES OF AMERICA
vs.
JOHN ANDERSEN, ALIAS JOHN ANDERSON. } Indicted for murder.

I, M. F. Pleasants, clerk of the circuit court of the United States of America of the fourth judicial circuit in and for the eastern district of Virginia, do hereby certify the foregoing to be a full, true, and correct copy of the record and of the proceedings in the above-entitled issue.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 12th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

[SEAL.] M. F. PLEASANTS, *Clerk.*
By H. S. ACKISS, *Deputy Clerk.*

306 (Indorsement on cover:) Case No., 16796. Term No., 583. John Andersen, plaintiff in error, vs. The United States. E. Virginia C. C. U. S. Filed February 14, 1898.

No. 583.
Brief of Plaintiff in Error
Filed April 11, 1898
583

APR 11 1898
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

JOHN ANDERSEN, Plaintiff in Error,

vs.

THE UNITED STATES, Defendant in Error.

BRIEF FOR THE PLAINTIFF IN ERROR.

GEORGE McLANAHAN, Counsel.

R. L. Jackson, Printer, Norfolk, Va.

In the Supreme Court of the United States of America.

JOHN ANDERSEN, Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA.

To the Honorable Judges of the Supreme Court of the United States of America:

Your petitioner, John Andersen, respectfully presents the following case:

The plaintiff in error was indicted in the United States Circuit Court for the Eastern District of Virginia at the term commencing the first Monday in November, 1897, and the indictment charged the defendant with the crime of murder, for the killing of one William Wallace Saunders on an American vessel upon the high seas.

The defendant was tried at said court in December, 1897, and was convicted by the jury of murder and was sentenced to be hanged. He then sued out a writ of error to this court, and he respectfully submits to the consideration of this honorable court the following assigned grounds of error and exceptions, taken by his counsel:

The references are to the marginal paging of the printed records.

1. The indictment charges the homicide to have been committed by shooting and drowning, which are means

inconsistent in themselves, not of the same species, and therefore impossible to have occurred as alleged.

Minor's Institutes Crim. Law, 54.
4 Bl. Com. 190.
1 Russ, Cr. 465-7.
1 Wharton Cr. Law (8th ed.), Sec. 519.
3 Greenleaf's Evid, 141.

At common law (and there has been no modification by statute) the indictment should charge the offense as committed. No variation was tolerated except that it was permitted to prove the homicide to have been committed by a means of the same species as that alleged.

Where the homicide was alleged in the same count to have been committed in two ways thoroughly inconsistent and not of the same species it was and is likewise demurrable.

2. The venire for the jury in this case (p. 12) was a venire for a special jury summoned after the term began. It was not the regular jury for the term, which was not used. It does not appear that it was authorized by any order of court or was summoned for the purpose of trying this case by order of court. The *record* should show that it was summoned for the trial of this case; that it was a special jury for that purpose, and that it was summoned by order of court.

The law requires the venire to be summoned for the term before the term begins; that is to say, the regular venire for the trial of cases at the ensuing term. If that jury is discharged, or for any reason it is improper to use it, a new writ must issue by order of court, and the record should show that it was so ordered.

The term began November 1st, 1897.

Revised Statutes, Sec. 658.

The jury that tried this case was not summoned until December 6th, 1897, and this, therefore, was not the regular jury that was summoned before the term began. No order was entered for this special jury being summoned, but it was summoned by the clerk issuing the writ without an order.

The special jury must be summoned by an order of court.

Revised Statutes U. S., Sec. 803.

3. The third assignment of error is to the question or questions asked A. J. Hall, a witness introduced for the Government. Hall was put upon the stand and asked a series of hypothetical questions. Hall was not present on the schooner at the time of the homicide. He was not examined as an expert, and he disclaims all knowledge of the condition of the vessel at the time of the homicide, either as to the way in which her sails were set, the character or condition of her deck load, or any other *fact* as to her then condition.

He was asked the question, "Is it customary in loading vessels with a deck load of lumber to leave passage-ways or stairways to go down in different parts of the vessel?" p. 36.

His answer was, "We most always do that when we can when the lumber comes right, but sometimes we have to go right over it when we can't."

He was then asked, "Are you not familiar with the deck load of the "Olive Pecker" when she sailed from Boston on the 20th of June?" "No, I know nothing about that."

The defendant moved to strike out the testimony as to what was customary. The matter was not in issue as to

the custom or non-custom, or any method of loading the vessel, but as to the particular state of affairs which existed then at the time of the homicide, and the witness having answered (p. 36) that he knew nothing about the condition of the deck load of the "Olive Pecker" when she sailed from Boston, or on the 20th of June, it should have been struck out at the instance of the defendant.

If the usages or custom or usual method of loading the vessel had been in any wise involved in this, the question and answer would have been perfectly legitimate, but it was the duty of the Government to prove the *actual* state of affairs if necessary for their case, which existed at the time of the homicide in reference to the way in which the vessel was loaded, but testimony as to how it was usual to load her or testimony of an hypothetical character, based upon the state of affairs of which the witness knew nothing, was clearly inadmissible and should have been rejected.

1 Greenleaf evidence, Secs. 440-441, and cases cited.

Witness may depose as to facts, within his knowledge, matters of opinion may be given in some cases, but not in one like the present. The Government had the entire crew of this vessel at its command, and could have proved the facts as they existed, as to the way the vessel was loaded. That would have been the best evidence.

1 Greenleaf evidence (15 ed.), Sec. 82.

4. The fourth assignment of error is to the exclusion of the question asked the Government's witness, John Lind.

Lind testified (pages 61 to 72 inclusive) that on the morning of the homicide the captain of the vessel, one Whitman, had beaten the prisoner, John Andersen, in reference to an affair about the captain's dog, and he stated all the facts in reference thereto.

This was brought out in full by the Government on the trial. Lind further testified that after this beating the prisoner had appealed to the mate for protection until he reached the shore, and the mate said to him, "Go to hell, you will get killed anyhow," or something like that. Pages 65-6.

The question was then asked:

Q. "Do you know of any other circumstances? Had this captain been brutal or inhuman to this cook in any other way?"

Which question the court excluded. This surely constituted a part of the transaction. It showed the condition of the mind that the prisoner was in. The jury had a right to know how the captain had treated this cook, the prisoner. The beating of him had been given in evidence, and it was a part and parcel of the transaction, and as such should have gone to the jury for what it was worth.

5. The Government alleged in its indictment that William Wallace Saunders was murdered by John Andersen, by John Andersen casting William Wallace Saunders into the sea and drowning him. The evidence of every witness for the Government was to the effect that in the altercation which occurred between the mate Saunders and the prisoner John Andersen, the mate was shot to death by Andersen. This was clearly a variance between the allegata and probata.

There is no principle of law known to the history of law by which an allegation of death by *drowning* is sustained by the proof of death by *shooting*.

The Government has its election as to the allegation of the means employed in producing the homicide, and having made that allegation it must stand to it. The indictment charging death by drowning affords no notice of the charge

of death by shooting. It is one of the principles of our law and is founded in the most ancient precepts of English jurisprudence that when a crime is charged the prosecution is called upon for a strict proof of the crime having been committed as alleged.

It is true that where there is an allegation that the crime was committed in a particular way a slight variation within the same species of the means as alleged in the indictment is permitted, but no precedent can be produced, either in England or America, of permitting the Government to allege that a man was murdered by drowning and to prove that he was shot to death.

The witnesses, Lind, p. 75; Andrew March, pp. 78, 84-85, 97; Juan De Dios Barrial, p. 94; Horsburg, 123, all testified that William Wallace Saunders was dead when he was cast into the sea by them, and the indictment alleges, p. 25, that the said John Andersen did, then and there, etc., at the time and place, etc., "cast, throw from and out of the said vessel into the sea and plunge, sink and drown him, the said William Wallace Saunders, in the sea aforesaid, of which said wounding, casting, throwing, plunging, sinking and drowning the said William Wallace Saunders in and upon the said high seas aforesaid, out of the jurisdiction of any particular state of the United States of America, then and there instantly died."

It is difficult to see how an allegation of drowning is supported by proof of shooting. He might, with the same propriety, have proved that he starved him to death or poisoned him. The Government could allege that he shot him with a gun or perhaps prove he shot him with a pistol, or cut him with a knife and prove the wonnd was made with a dirk or sword, but not by a method of a different species.

Minor's Institute of Crim. Law, page 55.

6, 7, 8, 9. John Andersen, the prisoner, was put upon the stand in his own defense and during his testimony he was asked by his counsel various questions contained in the 6, 7, 8 and 9 grounds of error. As the same reasons apply very nearly to all these four grounds of error they will be discussed together.

The questions were:

Q. "Now I want to ask this question to the witness. I want you to detail, with truth, to the jury everything which occurred in reference to this business from the time you shipped on the 16th day of June, until you left the vessel on the 6th day of August?"

Page 137 of the record.

He was also asked:

Q. "Now state to the jury all that occurred between you and the mate during that time," (meaning since his shipment in June,'97, as indicated by the previous question) "including all the facts and circumstances attending the 6th of August?"

Page 139 of the record.

He was also asked:

Q. "Now state what trouble, if any, you had with this mate previous to this occasion?"

Page 158 of the record.

And also asked:

Q. "I want to ask you whether on the day before the homicide you had had a difficulty with the mate, and without provocation on your part the mate had not attempted to throw you overboard?"

Page 161 of the record.

It is respectfully submitted that these questions called for the prisoner's defense in this matter, and that he should have been permitted to have answered all four interrogatories propounded to him. All of which questions were objected to by the Government and excluded by the Court.

It was intended to show by this line of questioning, that on this voyage which began on the 20th day of June, 1897, until the date of the homicide, which occurred on the 6th

day of August, 1897, that this man was in a constant state of terror, brought about by the cruelties of the captain and mate.

He was asked to state to the jury all facts and circumstances *which had occurred* in *reference* to the *homicide* during this period, all conditions to which he was subjected, everything that passed between him and the mate; and then to particularize, he was asked to state all facts and circumstances attending the 6th of August; intending thereby to show the cruel and inhuman treatment of the prisoner by the mate and the state of terror to which he was subjected by his cruel and inhuman conduct.

Then he was asked what trouble, if any, he had had with the mate previous to this occasion, referring, of course, to the occasion of the homicide.

He was then asked, when the three preceding questions had been ruled out, whether or not on the very day preceding the homicide he had not been assaulted by the mate, and that without provocation on his part the mate had not attempted to throw him overboard, and he was not permitted to answer.

His Honor, the Circuit Judge, ruled that Andersen was to be confined in his testimony to occurrences which took place on the day of the homicide, and that nothing which had transpired antecedent to that date, the day of the homicide, was competent testimony in the defense of the prisoner. Page 159 of the record, where will be found the opinion given by the Circuit Judge for his ruling on that point.

The condition of Andersen's mind or rather the treatment which he received by the captain and the mate anterior to the date of the homicide whereby his mind was left in such a degree of terrorism as to render him absolutely irresponsible for his actions and the provocations which he received from the beginning of this voyage to the date of the homicide, no matter how great or how violent, were absolutely excluded from the jury, by this ruling.

The fact that the mate on the day previous had assaulted

him and had attempted to throw him overboard was excluded, and the reason why Andersen believed that the mate intended to make way with him when he approached him on the morning of the homicide with the marlin spike, as if to do him great bodily harm, was taken from the jury when Andersen's answer to these questions, especially the last, were excluded by the ruling of the Court.

Andersen should have been permitted to say what had transpired between him and the mate previous to August 6th, the day of the homicide, to show in what light he had a right to regard the mates approaching him in a hostile manner on the day of the homicide.

It was very important that the jury should know the relations which existed between Andersen and the mate prior to the 6th of August, how he had treated him, whether cruelly, brutally or violently, in order that the jury might form a proper estimate of whether or not Andersen had a right to regard the demeanor of the mate towards him on morning of the 6th of August as such as to put him in bodily fear for his life or limb.

Wallace vs. U. S. 162, U. S. 466.

In Wallace's case, last cited, the accused was not allowed to answer the question as to whether he was in bodily fear of the deceased at the time of the homicide this Court held it error—that he should have been permitted to answer the question. If this be so, surely he should be permitted to state the facts and circumstances which put him in that condition of mind—that the jury might judge whether they were sufficient to do so. There was evidence tending to prove that on the occasion of the homicide the deceased had approached the prisoner in a hostile attitude, with a marlin spike in his hand, *as if* to stab him with it; previous hostile and violent acts on the part of the deceased should have been permitted to have been proved.

Kerr on Homicide, Sec. 172 and Seq.

Oder vs. The Commonwealth, 80 Kt'y, 32.

10. The witness, John Darnhardt, was asked (page 225) whether he was acquainted with the general reputation of the captain.

It must be borne in mind that on the morning of the homicide the captain had assaulted Andersen and that Andersen had appealed to the mate for protection from the captain and the mate had told him to "Go to hell, you will get killed anyhow."

Lind's testimony, pages 63-5.

Andersen's testimony, page 142.

The question was asked with a view of showing that the captain was a man of intense brutality, and that the mate was backing him in his impositions on this sailor. The terror to which Andersen was subjected was a part of his case, and the character and reputation of his captain for brutality was an incident of it. Darnhardt, who knew the facts, should have been permitted to testify as to the captain's reputation for brutality.

11 and 12. These grounds of error consist in the refusal of the trial Judge to give certain instructions asked for by the prisoner's counsel, and in lieu thereof granting a charge which is submitted was erroneous as applied to the conditions and facts of the trial at bar.

The theory, I presume, upon which the Judge's charge was given was based upon the decision in the St. Clair case 54 U.S. 134 and in Sparf's case, ~~both~~ reported in 156 U. S. 51

It excluded from the jury the question of manslaughter altogether and told the jury substantially that in the case at bar it must either find the prisoner guilty of murder, as charged in the indictment, or must acquit.

The language of the Court was: "The other felonious homicide to which I call your attention, manslaughter, is

the unlawful killing of a human being without malice, either expressed or implied. I find it to be my duty, gentlemen of the jury, to say to you that if the defendant has committed a felonious homicide, of which you are the only judges, there is nothing before you that reduces it below the grade of murder."

There is no proof in the record whatever of any grudge, premeditation or malicious intent on the part of the accused towards the deceased. It appears by the record that on the morning of the 6th of August, 1897, the deceased was killed by the accused on the deck of the schooner "Olive Pecker."

There were two versions of the affair. One given by the witness Martin Barstad (p. 41). Barstad says: "I heard a report of a shot in the captain's cabin, which was connected with the wheel-house by the after-companionway. Immediately after I saw John Andersen, the accused, come running up the after-companionway and through the wheel-house with a pistol in each hand and one in his hip pocket. He ran up to John Lind, who was standing amidship by the rigging by the middle mast. He said something to Lind, but I did not hear what it was. I heard him sing out to the mate, who was up in the cross-trees of the foremast at work in the rigging, and say, 'Come down, Mr. Saunders. The mate said, 'What do you want, steward?' In a little while the mate finished the job and started down the rigging. When about midway down, and when the cook Andersen was standing on the top of the forward house, the mate starts down and said, 'What have you got in your hands?' 'I got guns,' he says. 'Where did you get them?' says the mate. 'Down in the cabin,' he says. The mate came down and stepped on the forecastle head—not on the forecastle house. Then Andersen fired a shot, the mate reeled and faced him and said, 'For God's sake don't shoot me, cook.' The cook fired another shot, and the mate kept on reeling, and the cook fired another one and a third one, when the mate fell, and he shot him once after he had fallen."

John Lind testified (p. 54): "I saw Mate William Saunders on the 6th of August, this year. He was killed that morning by John Andersen on the forecastle head, on the left or port side thereof. I saw Andersen just before the shooting of the mate that morning coming up from the cabin through the after-companionway and through the wheel-house. I was standing amidship. He came up with a revolver in each hand. He came right up to me and asked me where the mate was and said, 'I have killed the captain and now the mate goes, too.' The mate was then aloft in the rigging of the foremast. I went down on the lee or starboard side of the vessel to the forecastle," etc. He saw no shooting.

This is all the testimony of the Government direct on the fact of the killing. If taken alone it would not have justified the charge. The killing might have been felonious, but still manslaughter, not murder. The killing might have arisen from heat of blood, sudden provocation, unjustifiable without excuse, but still not wilful, deliberate and premeditated killing; which is necessary to constitute murder.

So, therefore, if the Government's case had been taken by itself the charge of his honor the trial Judge would not have been warranted by law; he should not have excluded the question of manslaughter from the jury.

But it thoroughly ignores the testimony of the defendant.

His account of the transaction is this (his testimony begins page 141 of the record), and he states substantially that on the morning of the homicide the captain of the vessel had assaulted and beaten him;that he had appealed to the mate for protection from the captain until he got into port, who had told him, "Go to hell, you will get killed anyhow;" that his mind was in such a condition that he did not know whether to jump overboard or hide; that he looked out for another vessel, intending, if he saw any such, to endeavor to make for her: that after awhile he went into the cabin; while there the captain made an assault upon him, to defend which he shot him; that he then thought

of the mate, ran out on deck and inquired where the mate was; that he *did not* call the mate down from the rigging, and that the mate came down and said (here Andersen's testimony is given, p. 144, verbatim). He (the mate) says: "Where is the captain? where in the hell did you get them guns?" He says: "And where is the captain?" I never made no answer to him, but I stayed on top that house there as the mate came down, and he had this marlin spike around his neck. I will just show you how he had it, if you please. He had taken this hitch on this marlin spike, as represented to you before. He came down like this and walked up like this (indicating by appropriate gestures walking toward the bowsprit) and turned in this direction (to the right) and came towards me in that direction (on the starboard side). He took the half-hitch out of the marlin spike like this, and the marlin spike was hanging down when he came towards me. I was standing there and had the guns then. I had three of them, and I held them in my hand all the time. I had an apron around my waist, and I had no pockets here in the pants. He got this hitch off the marlin spike and came to me like this (indicating by proper gestures) to take the marlin spike off his neck and shove the marlin spike into me. I pulled the gun and shot him. The first shot struck him somewheres (in the side.) He was still coming towards me, and I shot twice or three times altogether, when the man fell dead. In the meantime John Lind has been running into the lee side of the house. Now, he stated here yesterday to you gentlemen that I came up to him and says, "Now the mate will go too." But that belongs on the lee side of the house to that man. When he came there he told them, "Now the mate will go too."

Q. "You mean by that that you did not say it at all?"

A. "No, sir. That belongs to John Lind and into the lee side of the forecastle; that is where that belongs. So I stood there, and John Lind he was the man that came up first and there was nobody else came up, so I says, "Men," I says, "aint you coming up," I says. In the condition I

felt, I felt actually frightened of the men the way I was, because I was completely gone."

These are as conflicting as two stories could be. If Andersen is to be believed, there is strong reason to say that he committed the homicide in self-defense. It might be urged, however, that Andersen after having killed the captain according to his own account should have hid himself out of the way of the mate, but that after going on deck and the mate having advanced on him with the marlin spike that he should have retreated as far as in safety he could have retreated before taking the mate's life, but it must be borne in mind that this was on a ship, where his means of retreat were cut off. There is no proof of any previous quarrel with the mate, no proof of any grudge or any premeditation or deliberation.

All of the hostile intention towards the mate grew out of the immediate circumstances attending the killing. Can it be said that there was no testimony in this case tending to reduce this crime from murder to manslaughter?

These facts as related by Andersen make out at most a case of manslaughter and nothing else; they at least *tend* in that direction. A jury, if they believed Andersen, could so find, and there is *some evidence* (to use the language of the decisions) of manslaughter.

This Court in a very recent case has considered this question fully and it has announced the law governing the trial court in cases of this nature.

The case of Stevenson v. U. S., 162, U. S. 313, which was decided April 13th, 1896, not yet two years ago, fully carries out the principles for which we contend. In that case the Court refused to submit the issue of manslaughter to the jury. The Supreme Court in its opinion says:

"The question is whether the Court erred in refusing this request (i. e., submit issue of manslaughter to the jury). The evidence as to manslaughter need not be *uncontradicted* or in any way conclusive upon the question; so long as there is *some* evidence upon the subject, the *proper weight* to be *given* it is for the jury to determine. If there was

any evidence which tended to show such a state of facts as might bring the crime within the grade of manslaughter it then became a proper question for the jury to say whether the evidence were true and whether it showed that the crime was manslaughter instead of murder. It is difficult to think of a case of killing by shooting where both men were armed and both in readiness to shoot, and where both did shoot, that the question would not arise for the jury to answer, whether the killing was murder or manslaughter or a pure act of self-defense. The evidence might appear to the *Court* to be *simply overwhelming* to show that the killing was in fact murder, and not manslaughter or an act performed in self-defense, and yet *so long* as there was *some* evidence *relevant* to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be a matter of law for the decision of the Court."

The Court then goes on to say that in a particular case, where there was no evidence upon which to base such a finding, the Court would have the right to instruct the jury to that effect, i. e., take the issue of manslaughter from the jury, and cites

Sparf v. U. S., 156; U. S., 51.

In Sparf's case the facts were very different from this case. There three sailors entered into a conspiracy to throw the mate overboard. They endeavored to get a fourth to join them—this was in evidence by this fourth man. The facts were, they found blood on the vessel and they found a club stained with blood and hair, and identified the hair, and the mate was missing, and one of the trio had admitted to this fourth that they had thrown the mate overboard.

The trial judge in this case instructed the jury that these men were either guilty of murder or nothing, that if they believed the facts above recited that they must find a verdict for the Government.

There was in that case direct evidence of premeditation, and the corpus delicti was established. There was no evi-

dence of an affray, and direct evidence of the conspiracy to make way with this man. The cases are by no means parallel.

In the case of Stevenson, supra, the Court distinctly lays down the rule (p. 315), that where there is any evidence tending to show manslaughter, it is a question of fact for the jury and not one of law for the Court. To use the language of the Court, in Stevenson's case (p. 316): "If there were some appreciable evidence upon that subject, manslaughter, its particular weight and credibility was for the jury."

In Stevenson's case, Stevenson had a knife and the deceased a pistol. The plaintiff in error, by reason of previous circumstances, was laboring under great excitement at the saloon, and as one witness says, "seemed to be mad." "The deceased came to the door of the saloon and shot his pistol into the room, and the bullet came within a few inches of the head of the plaintiff in error, who immediately fired his rifle in the direction of the deceased. The ruling of the trial judge in effect was to say that as a matter of law there was nothing in all this evidence, if true, which would *permit* the jury to find that the plaintiff in error when he fired his rifle was so much under the influence of sudden passion, caused by these circumstances and by this assault upon him, as not to have been actuated by that malice which the law defines as a necessary ingredient in the crime of murder. Is it perfectly plain and clear as a conclusion of law that shooting at another under circumstances such as were detailed by some of the witnesses in this case, can have no tendency to raise within the mind of the person thus assaulted such a sudden passion of anger or terror as to deprive his subsequent acts of that malice which is necessary to make it murder? If it is not to be so asserted as matter of law, then it becomes a question of fact in such a case, and that question must be answered by the jury. Whether the witnesses told the truth in regard to the circumstances is not for the court to say, nor is it for the court to decide upon the weight to be given to them if proper for the consideration of the jury."

The case of Wallace against the United States, 162 U. S., p. 466, was exactly to the same effect as the case of Stevenson v. U. S. In this case, however, it arose on a question of evidence. Counsel asked Wallace, "You may state, Mr. Wallace, what Zane did at that time just before you fired the shot." A. "He just took his hands something like this (indicating) saying, "Damn you, I will kill you."

Q. "You may state to the jury from that demonstration what you believed Zane was about to do?"

To this question the plaintiff objected. The objection was sustained, and defendant excepted. But this court overruled the trial court's decision on the ground that it was for the jury to judge as to the weight of this testimony in fixing the degree of crime, if any.

The mere fact that Andersen was armed or had armed himself does not take this case from the ruling that was decided in Gourke v. U. S., 153, 183; Thompson v. U. S., 155, U. S. 27, and also Wallace v. U. S. 162, 466, which cites a number of cases, that where a deadly weapon is employed it might be manslaughter or murder according to the circumstances.

13. This assignment of error was for the refusal of the Court to correct its own error and grant a new trial for the reasons which have been set out above. The motion was made in conformity with the practice requiring a motion to be made for a new trial before the case would be considered on a writ of error.

The Circuit Court should have granted a new trial for the same reason here indicated to the Court that its judgment should be reversed.

14. The motion in arrest of judgment should have been granted for the error which appeared upon the face of the record because the record does not show that the venire for which it was used for the trial of this case was summoned pursuant to an order of the Court. So far as the record is concerned the said venire was a nullity.

Authority is given to the Circuit Court where a regular jury is summoned for the term which cannot be used for the trial of cases for any reason, that the Court may enter an order directing jurors to be summoned for the trial of any particular case. The record should show that an order of Court to this effect was entered and that a jury was summoned for that purpose.

The same points are here urged in the support of the motion in arrest of judgment as were urged as grounds of error for the Court's refusal to quash the venire alleged to have been summoned in this case and set out herein where the second ground of error is discussed.

All of which is respectfully submitted.

GEORGE McINTOSH,

Counsel for John Andersen, Plaintiff in error.

No. 583.

Petition for Rehearing.

Rec'd & Dft. May 21, 1898.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

JOHN ANDERSEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 583.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

PETITION TO REHEAR.

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SUPREME COURT OF U. S.
RECEIVED
MAY 24 1898

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

PETITION TO REHEAR.

John Andersen, the plaintiff in error in the above entitled suit, respectfully asks the rehearing of the above entitled cause on the grounds set out below:

1. This Honorable Court having duly considered at length every ground of error and having evidently given the case the deepest, closest and most careful consideration, as appears by the opinion filed in this matter, on the 9th day of May, 1898, his counsel would ordinarily feel inclined to acquiesce in the ruling without further discussion.

But owing to the fact that human life is at stake and it is probable that the case was not presented by counsel for the plaintiff in error as its merits deserved or its importance required, he further would call attention to the ruling on three assigned grounds of error.

1. The opinion (page 16) in discussing the admissibility of certain evidence offered by the prisoner says :

"The point to be considered is whether evidence of transactions previous to that day was admissible in the light of the testimony of the accused in respect of what passed on that day. It will be perceived that no specific offer of proof was made. But, assuming that counsel had offered to show by the accused that he had had trouble with the mate previously to August 6th and that the day before he had had a difficulty with him, and the mate, without provocation, had attempted to throw the accused overboard, would such testimony by the accused have been admissible in view of his own detailed account of the homicide and its surrounding circumstances? On what legal principle could it have been held to have a tendency in justification, excuse or mitigation?"

It is admitted that this fairly and squarely presents the issue. The Court then recites the testimony as given by Andersen and presents an epitomized statement of what took place, made by Andersen himself and what he said. It then infers from that statement that Andersen was the aggressor, the premeditated aggressor and stated from Andersen's statement "the inference is irresistable, that to avert the danger of the gallows Andersen killed the mate—cast his body into the sea, and burned the ship;" states that there can be no pretence whatever that he was acting under a reasonable belief that he was under great bodily harm.

The conclusion drawn from this by the court, is that it offered no basis for the introduction of evidence of prior provocation, or of injuries previously inflicted, for no overt act on the mate's part provoked the evil intent for which Andersen sought him out on this occasion.

It is respectfully submitted that the proffer of evidence contained in the 6, 7 and 8 assignment of error (pages 15–16 of the opinion) were for the very purpose of showing that the previous transactions between these two men were such as to lead Andersen to believe that he was in imminent danger of death or great bodily harm at the hands of the

mate. While it might be said that there can be no *pretence* that he was in such fear from the testimony which was *admitted*, it was our purpose to show by the *testimony which was excluded* that such a fear did exist and rationally existed.

The questions were intended to show brutality on the part of a superior officer. One of them was whether this mate had not on the day previous without provocation on Andersen's part attempted to throw him overboard. This we regarded as a "*specific offer*" of proof to that effect and it is submitted that where one man attempts to throw another overboard, an officer of the ship, one standing in authority over the sailor acts in such an inhuman and brutal manner that that sailor should on his trial for the murder of the mate be permitted to prove acts of a brutal nature done to him by his officer, especially where they are a part of a series of continued and connected transactions all leading up to the homicide, and further that Andersen did not seek him with wrongful intent, but was not permitted to so show. Every thing but what occurred on August 6th being ruled out. While it is true that the Court looking *alone* at Andersen's testimony which was *admitted* may fail to see any provocation or such a state of terrorism on the part of the accused as to render him demented and beyond the pale of reason, it is submitted that that accused should be permitted to show that such condition of affairs existed, and was *brought about* by the *brutality* and the *violence* of the person of whose murder he is accused. All this was excluded by the ruling of the Lower Court. The proof to this effect was offered at four distinct stages of the proceedings and while perhaps it was proper that it should have been excluded in the preliminary stages, still *after* the statement of the facts by Andersen of the occurrences on August 6th had been given, is it not just to him that he should be permitted to give the reason for these occurrences, the facts that lead up to them, the condition of affairs which brought about his feeling of fear of the mate? and above all, were they not proper circumstances for the *jury* and not for the Court to consider?

While this Court might claim that the provocation was insufficient and that there could be no state of terrorism brought about by any such acts which would justify the commission of the homicide itself, still is not *this* a question for the jury, and should not the jury have been permitted to pass upon it?

Why should a rule limiting transactions to *the day* of the alleged homicide be adopted? If any act bore upon the transaction, no matter how remote, why should it be excluded from the consideration of the jury because it happened anterior to August 6, 1897?

2. The second point to which I would call the attention of the Court is the question of the charge which excluded the consideration of the fact of manslaughter from the jury. It is very true that Justice McKenna gave this instruction in the case of St. Clair, 154 U. S., which was reaffirmed by this Court, and that it was also reaffirmed in Sparfs' case 156, U. S., and was quoted approvingly in Stevenson's case, 162 U. S.

Sparfs' case is to the effect that a jury would not be justified in finding a verdict of manslaughter if there were *no* evidence to support such a finding and in that event the court would have the right to instruct the jury to that effect.

Sparfs' case and St. Clair's case on the one hand and the case at bar on the other are as far apart as the poles. There was no pretence in Sparfs' case and St. Clair's case of any struggle, of any hostility or any mutual combat or any hostile demonstrations between the parties to the fray. Three sailors formed a conspiracy to throw the mate overboard, which they did. There was no proof whatever of any hostile attack by the mate upon them or no act on his part, however slight, by which any demonstration could be inferred.

In Stevenson's case, on the contrary, there was evidence tending to show hostile demonstrations and acts on the part of the deceased towards the accused, as it was in Andersen's case.

Can it be said that there was not *some* evidence to this effect? It need not be uncontradicted, but was not its proper

weight to be given to the jury to determine? Stevenson's case says further *any* evidence which *might tend* to bring the crime within the grade of manslaughter that the charge which excluded it was improper, and this was the ruling, notwithstanding the fact that the evidence *might be overwhelming* to show that the killing was in fact murder and not manslaughter. Is not this same case to the effect that a charge, as this charge was given, is improper so long as there is *some evidence* relative to the issue of manslaughter, and we submit that this question is a question for the jury, and while the Court might draw its conclusions as to its weight and as to the propriety of a jury's drawing a conclusion in favor of a verdict of manslaughter, still it has right so to do if there is any evidence relative to that issue in the record, otherwise the Court usurps the province of the jury and renders their functions useless.

3. I beg again to refer to the testimony of the witness Hall (top page 15 of the record). It is suggested that this was not made a matter of exception at the trial and the evidence on that point is quoted on page 11 of the opinion.

The matter occurred in this way:

"Q. Is it customary in loading veesels with a deck load of lumber to leave passageways or stairways to go down in different parts of the vessel?

A. We most always do that when we can, when the lumber comes right, but sometimes we have to go right over it when we can't.

Q. Are you or not familiar with the deck load of the "Oliver Pecker" when she sailed from Boston on the 20th day of June?

A. No, I don't know anything about that.

Counsel for the accused moves to strike out all testimony as to the condition of the vessel at the time of the casualty.

Mr. White. I have asked him nothing about that. He is simply *describing the deck in view of his familiarity with the vessel* and what can be seen from one portion of it to the

other, and whether or not if lumber was upon it whether a view could be had over it.

Mr. McIntosh. And it is *on that very point that I wish to make the objection*, claiming that a *hypothetical question* put to a witness in a criminal trial is improper unless it is proved that the hypothesis exists in point of fact. I take it that there is no better rule of evidence known to the criminal law. Mr. White, after putting these hypothetical questions as to the *deck load* and the *condition of affairs* under a certain state of hypothesis, finally winds up by asking if he knows anything about the deck load in this particular case. He is not acquainted with the condition of the vessel, and I say therefore that all previous statements made by him as to her condition are entirely improper.

Judge Goff. If I understand it he has testified as to the condition of the deck—

Mr. McIntosh (interrupting). As loaded at the time of the alleged occurrence.

Judge Goff. The Court does not understand that he has so testified. Anything that would bear that construction, as a matter of course, will be excluded from the jury. I think that it is eminently proper that the jury should understand the character of the vessel. This man is familiar with it, he built it and has commanded it. He is detailing to the jury nothing that took place at the time of the alleged offence. *He is giving the general character and situation of the vessel so that you may understand it, which I think is eminently proper.* As he was not on the vessel at the time of this occurrence the Court will not permit him to testify about anything that took place then.

To which ruling of the Court the prisoner excepted."

Judge Goff in his ruling (p. 15 of the record) evidently meant to exclude all testimony of the witness Hall which related to the deck load of the vessel at the time of the homicide, on the ground that the witness had himself declared that he knew nothing of its condition at that time, not being present. His Honor says "The Court does not understand

that he has so testified, anything that would bear that construction will, as matter of course, be excluded from the jury. I think it eminently proper for the jury to understand the character of the vessel." The Court will bear in mind that we were discussing the answer to the question "Is it customary, etc." which I intended to move to strike out. Judge Goff then goes on to say "This man is familiar with it, he built it, he is detailing to the jury nothing what took place at the time of the alleged offence, *he is giving the general character* and situation of the vessel, so that you may understand it, which I think eminently proper," and as he was not on the vessel at the time of the occurrence, the Court will not permit him to testify about anything which took place then," to which ruling of the Court the prisoner excepted.

I submit that all of Judge Goff's ruling had reference to the question "Is it customary, etc." He would not permit Hall to say what took place at the time of the transaction, because Hall had admitted that he was not there and knew nothing about it, but he did permit Hall to give the custom of loading vessels as answered by him and it was to this ruling so permitting this answer to stand that the prisoner by his counsel excepted, otherwise why should he except at all to Judge Goff's ruling.

The ruling forbidding him to testify as to the condition of the deck load at the time of the homicide, when he was not present, was in the prisoner's favor, and surely it cannot be construed that the exception taken on page 15 should refer to that. If it did not, to what did it refer?

Why it referred to the ruling of the Court in permitting him to answer the question as to what was customary. Judge Goff himself states in his opinion (p. 15) to what it referred. "He is giving the general situation of the vessel so that you may understand it, which I think is eminently proper, as he was not on the vessel at the time of this occurrence the Court will not permit him to testify about anything which took place then."

But the Court did permit him to testify as to what

was customary, whether it was customary in loading vessels to do certain things, to which ruling of the Court the prisoner excepted.

I again submit, therefore, that the testimony admitted by Judge Goff by this ruling on page 15 of the record, namely, "as to what is customary" or "what was customary" in loading vessels, was improperly admitted, and that such ruling of the Court was excepted to.

All of which is respectfully submitted.

JOHN ANDERSEN,
By GEORGE McINTOSH,
His Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1897.

JOHN ANDERSEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 583.

I, George McIntosh, a member of the bar, practicing in the Supreme Court of the United States, and in all the Federal Courts in the Fourth Circuit, and attorney for the plaintiff in error in the foregoing petition in the above entitled cause, do hereby certify that I have carefully examined the opinion and decision of the Supreme Court of the United States, rendered May 9th, 1898, and that in my opinion the same is erroneous in respect to the matters overlooked, and wherein it is alleged there are errors in the foregoing petition.

GEORGE McINTOSH,
Attorney for the Plaintiff in Error.

No. 583.

APR 11 1898
JAMES H. McKENNA
CLERK.

(Brief of Atty. Gen.l (Richards) for
D. C.

Filed April 11, 1898.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN ANDERSEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 583.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

JOHN ANDERSEN, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
No. 583.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On December 23, 1897, the plaintiff in error, John Andersen, was convicted in the circuit court of the United States for the eastern district of Virginia of the murder, on August 6, 1897, of William Wallace Saunders, on an American vessel on the high seas off the coast of Brazil. Saunders was the mate and Andersen the cook on the three-masted schooner *Olive Pecker*.

The case was tried before Goff, circuit judge, and Hughes, district judge. The uncontroverted facts ap-

pear in the preliminary statement of the bill of exceptions (Record, pp. 8 and 9).

> Be it remembered that the American three-masted schooner *Olive Pecker* sailed from Boston, Mass., on the 20th day of June, 1897, for Buenos Ayres, South America, with a cargo of lumber under and on deck. She had on board a captain, J. W. Whitman; a mate, William Wallace Saunders, sometimes called William Saunders; an engineer of a donkey engine, William Horsburgh; a cook, viz, the defendant, John Andersen, and four seamen, viz, Martin Barstad, a native of Norway; John Lind, a native of Sweden; Juan de Dios Barrial, a native of Spain, and Andrew March, a native of Newfoundland; that the said *Olive Pecker* was an American vessel, belonging to citizens of the United States; that the said vessel proceeded from Boston on her course to her port of destination until the morning of August 6, 1897, when, on the high seas and about 100 or 150 miles off the Brazilian coast, between 9 and 10 o'clock on that morning, the captain, Whitman, was shot in his cabin, and shortly thereafter the mate was shot on the left-hand side of the forecastle head *and his body immediately thrown into the sea*. The body of the captain was also thrown into the sea. Several hours thereafter the said vessel *Olive Pecker* was burned, and the cook, engineer, and four seamen took to the sea in an open boat. Twenty-eight or thirty hours thereafter they reached the Brazilian coast, where, having spent the night on shore, they separated the next morning, the accused and John Lind going in a northerly direction and the other four going in a southerly direction. That the accused and Lind, within a few days, reached Bahia, in Brazil. Both shipped, the accused on a vessel called the *Bernadotte*, bound for Pensacola, in the United States, and Lind on a Brazilian barkentine, bound for some point in Spain.

The other four men, having the Spaniard as their spokesman, he being familiar with the language of the country, and not finding an American consul, made known to the Brazilian authorities what had transpired on the *Olive Pecker*, with the request that telegrams be sent along the coast for the arrest of the accused, John Andersen. These four men, having secured passes on a vessel to Bahia, arrived there several days after the arrest of the accused and were placed in charge of the American consul at that port. The accused handed to the American consul a statement in his own handwriting, purporting to be an account of the voyage of the *Olive Pecker*, and also made to the American consul a sworn statement, as did also the other five men, which said statements were duly transmitted to the Department of State at Washington, and upon the call of defendant's counsel were produced for his use at the trial, but were not produced in evidence.

At the direction of the Government at Washington, the American consul at Bahia kept the accused and the five men in custody at Bahia until the arrival at that port some time in the month of September, 1897, of the United States man-of-war *Lancaster*, when they were put on board of that vessel and brought into Hampton Roads, Va., in the eastern district of Virginia, that being the first district into which the accused was brought after the commission of the alleged offense; and the said accused, together with the five men, was turned over by the officers of the *Lancaster* to the United States marshal on the 7th day of November, 1897, and were duly placed in confinement in the city jail at Norfolk, Va.

The bill of exceptions contains all the testimony, both on the part of the Government and the accused, introduced at the trial. In addition to the members of the crew, Barstad, Lind, Barrial, March, and Horsburgh, the

Government introduced Thomas John Newton (Record, p. 13), a clerk in the State Department, who identified the original statements made by the accused and the crew before the consul at Bahia; A. J. Hall (Record, p. 13), who built and sailed the schooner for seven years, to describe the character of the vessel; Robert McGeouch (Record, p. 16), a superintendent of stevedores at Boston, who loaded the vessel and described how this was done; John Taylor (Record, p. 16), master at arms on the *Lancaster*, who identified the accused as the man brought from Bahia to Norfolk, and Thomas H. Cross (Record, p. 16), deputy United States marshal, who received the accused at Norfolk.

The accused testified in his own behalf (Record, p. 56); called Walter Small (Record, p. 93), a captain who had employed Andersen as cook for six months in 1895, and John Asberg (Record, p. 93), a millwright in Boston, who had known Andersen some fifteen years ago, who testified as to Andersen's character and reputation; and John Darnhardt (Record, p. 96), who was offered to prove the general reputation of Captain Whitman, of the *Olive Pecker*.

In rebuttal the Government introduced the testimony of the members of the crew and also of John J. McCarthy (Record, p. 110), a police officer in Boston, Peter C. Etheridge (Record, p. 111), a police officer in Boston, John G. Mariner (Record, p. 112), a shipping commissioner in Boston, and John C. Williams (Record, p. 113), a newspaper correspondent of the New York Herald, stationed at Washington.

THE FACTS OF THE MURDER.

The tragedy of the *Olive Pecker*, the murder of the captain and mate, the capture and burning of the ves-

sel, and the attempted escape in an open boat to the Brazilian coast, is graphically described in the testimony of the members of the crew. I quote from the record the salient facts.

The captain, Whitman, was the only American on board this vessel; the mate, Saunders, was a Nova Scotian; Horsburg, the engineer of the donkey engine, was a Scotchman; Andersen, the cook, a Swede; of the seamen, Barstad, a Norwegian; Lind, a Swede; Barrial, a Spaniard, and March, a native of Newfoundland.

MARTIN BARSTAD, a Norwegian sailor, was at the wheel in the wheel-house when the mate was shot, between 9 and 10 o'clock of the morning of August 6, 1897. He says (Record, pp. 16–18):

> I heard a report of a shot in the captain's cabin, which was connected with the wheelhouse by the after companionway. Immediately afterwards I saw John Andersen, the accused, come running up the after companionway and through the wheelhouse, with a pistol in each hand and one in his hip pocket. He ran up to John Lind, who was standing amidship by the rigging of the middle mast. He said something to Lind, but I did not hear what it was. *I heard him sing out to the mate, Saunders,* who was up on the crosstree of the foremast at work in the rigging, and say, "*Come down, Mr. Saunders.*" The mate said, "What do you want, steward?" In a little while the mate finished the job and started down the rigging. When about midway down, and when the cook, Andersen, was standing on top of the forward house, the mate started down, and said: "*What you got in your hands, cook?*" "*I got guns,*" he says. "*Where you get them?*" says the mate. "*Down in the cabin,*" he says. The mate came down and stepped on the forecastle head, not on the forecastle house. Then Andersen fired a shot. The mate reeled and faced him, and said: "*For God's sake, don't shoot me,*

cook." The cook fired another shot, and the mate kept on reeling; and the cook fired another one and a third one, when the mate fell, and *he shot him once after he had fallen.* Then the cook sung out to the men who were in the forecastle, "*I am in charge of this vessel; I am next to the mate.*" He sung out again: "*Won't you fellows come out?*" They came out and I saw them throw the mate's body overboard. I was at the wheel all the time. Then he marched the whole gang aft and went down in the cabin and brought the captain up and threw him overboard. He then said: "If any man like, he can put me in irons." He had two or three pistols, *one in his hand then.* He had said he was in charge of the vessel and had ordered the men to throw the mate and captain overboard. I was at the wheel all the time. Then he says: "Boys, come down and have a drink." He went down in the captain's cabin and handed out a bottle of whisky, about two parts full. He gave each a drink and took one himself. Then he marched the whole gang up on deck, just outside the door of the wheelhouse, and said: "*You know all you men is guilty for helping me throw the bodies over the side.*" The Spaniard told him to keep the vessel off, to clew up the gaff topsails and jibs, the outer jib, and make for port. The cook said: "*Damn; you want me to get hung.*" We said, "No, Steward; we don't want you to get hung." All the time he was armed. After a little he said to the Spaniard: "You the only sensible man amongst the crowd; I want to speak to you." Then he called John Lind afterwards and spoke to him. I don't know what he said. He ordered the men to do so and so. I left the wheel and went to the forecastle. The rest of the men came forward to get their clothes. He ordered us to get our best clothes and no more; *he said, take no discharges, bank books, nothing.* He ordered the men down in the booby hatch to get up a barrel addressed to the American consul at

Buenos Ayres. Then he told me to go down in the galley to tap some paraffine oil. I said, "No." He says, "*You go*," *and handed his pistol in my face.* "All right," I says, "Steward." I filled three buckets and passed them up, and Andrew March took it and threw it on the deck load. He was standing there armed all the time. Then he, the cook, ordered me to take the wheel. I went. The first fire commenced at the booby hatch; the next was forward. The boat was lowered and provisions put in it. We then got in the boat. I was the last man to get in. Then we hoisted sail in the boat, and *as we started the cook fired three shots, saying "That is man-of-war style."* He got the cartridges he loaded his pistol with out of the captain's drawer. I saw him pull the drawer out. He took a whole package and put some loose ones in his pocket. Then I told John Lind this shooting was not done yet. The schooner was burning a long time after we left her. I could see the glare late in the night. We saw a steamer's lights coming toward us about dark the evening we left the *Olive Pecker*. The Spaniard was at the tiller. The steamer looked like it was coming down on us. The cook took the tiller from the Spaniard and nearly upset the boat. He says, "If they come down and pick us up, I will pop them." It was 12 or 1 o'clock when we left the *Olive Pecker*. No vessels were in sight which could have picked up the bodies of the mate and captain. On the way to the shore in the sailboat the cook told us if we were picked up by any vessel we would tell that the captain and mate went down in the booby hatch to try to put a fire out, and the mate came up on fire and jumped overboard, and the captain stayed down and never came up no more. We landed about 8 or 9 o'clock of the evening of the day after we left the *Olive Pecker* at some point on the Brazilian shore. We made a tent of the boat sail and spent the night there. The next morning we drew lots to see

who should go together, having decided to go in twos. Me and Andrew March drew for partners and Horsburgh and the Spaniard, and John Andersen and John Lind. When we parted the cook fired three shots. It made us step quick. John Andersen and John Lind went in a northerly direction and the rest of us in a southerly direction. We four walked till we got to a small village and asked for an American consul. The Spaniard did the talking; he could speak the language—the Portuguese language. We got a night's lodging there. The next morning the Spaniard went to the head of the police. The Spaniard was told that a steamer was coming in that day, bound for Bahia. The police authorities got passage for us on to Bahia. We went on to Porto Seguro and there gave statements to the Brazilian authorities. The captain of the steamer, at the request of the Spaniard, telegraphed on to Bahia to arrest John Andersen and John Lind. When we got to Bahia Andersen and Lind were in jail. We went to the American consul there and made our statements. Then we were kept there by the consul till transferred to the American ship *Lancaster* and brought him to Hampton Roads, Va.

In answer to questions, Barstad testified that the sails were swinging to the starboard or right-hand side of the vessel, and that Andersen ran down the port or left-hand side of the vessel (Record, pp. 18, 19); the mate finished his job in the rigging, hung the marlin spike around his neck, and came down the rigging (Record, top p. 19); Andersen was standing on top of the forward house and the mate on the forecastle deck, about 3 feet lower, when he was shot. (Record, p. 19.)

Asked whether the crew burned the vessel because they were afraid, he replied (Record, bottom p. 19):

> He (the accused) said, "I *will make every s—n of a b—h as guilty as myself*." (Record, bottom p. 19).

JOHN LIND, a Swede, was standing amidships when Andersen came on deck after killing the captain. He says (Record, p. 22, 23, and 24):

> I saw Andersen just before the shooting of the mate that morning, coming up from the cabin through the after companionway and through the wheelhouse; I was standing amidships; he came up with a revolver in each hand; *he came right up to me and asked me where the mate was, and said, "I have killed the captain, and now the mate goes, too."* The mate was then aloft in the rigging of the foremast. I went then down on the lee or starboard side of the vessel to the forecastle house; I went and called the watch below in the forecastle house. I said, "*You better look out, because the cook is on deck with revolvers.*" As I was calling through the window I could not see on the left of the vessel. While I was calling to the men I heard a shot on the port side, on the forecastle head. I heard three or four shots; I don't exactly know how many. I heard the steward call to the men to come out; for all of them to come up there. He was calling the men in the forecastle house. He said he wanted us to throw the body overboard. When I came up all hands were there, except the man at the wheel, Martin Barstad. The mate was lying on the forecastle head *with his face downward. He had a marlin spike tied around his neck.* A marlin spike is used for splicing ropes—an instrument that all sailors carry aloft when they go up to splice a rope—it is carried around the neck by a long lanyard and a half hitch on the point to keep it from sticking in his legs. We threw the body overboard. Then the cook told us to come aft and get the captain's body overboard. We went in the after cabin and found the captain sitting in his chair—sitting like this, sir, *with his hands folded in his lap. He looked as if he was alive.* I saw blood on the side of his head, on the left side. We were told to take him up by

Andersen; he helped. He was taken up and thrown overboard. Andersen was armed all this time. *Before throwing the captain's body overboard Andersen took hold of the captain's arm and felt his pulse.* When the body was thrown overboard *Andersen cursed it.* The captain's body was sitting in a chair in the after cabin, near the sofa on the starboard side of the cabin. He was facing forward. I had only been in the cabin once before, when we were in Boston. On American vessels seamen do not go in the captain's cabin unless they are sent or called there. There are doors opening from the forward cabin into the after cabin, and from the mate's room into these cabins.

After the captain's body was thrown overboard Andersen told us to go down and he would give us a drink. We went down in the cabin, in the forward cabin where the dining room table was, and got a drink. I don't recollect whether Andersen drank with us or not. There was not much liquor in the bottle, a little over half a bottle, I think, not enough to make any one drunk. I didn't see any one drunk. After taking a drink we went up on deck and talked about making the small sails fast. The Spaniard and myself suggested that the small sails be made fast and to make for land. This was not done. Andersen said: "No; keep her up to her course." She was off a little. "Keep her up to her course," he said; "*you want me to be hanged.*" He then said to the Spaniard: "You are about the sensiblest man; I want to speak to you." I did not hear what he said to him. He then called me. I went to the lee side of the wheelhouse and he asked me what I thought was best to do with the vessel. I said, "The only thing we can do now is to try to make for some land." He said, "*No; nothing is going to be done but to destroy the vessel.*" He did not say anything more to me after that. If he spoke to any of the rest I didn't see or hear it. He then ordered everything to make ready for to

leave the ship. The old boat sail was all tore up, and I started to patch that. I was engaged about it about an hour, I should think. He then gave orders to lower the boat. Me and the Spaniard lowered the boat. It was the big boat you see hanging at the stern in the picture. Me and the Spaniard did lower the boat and Andrew March went down and unhooked the tackle, and we hauled the boat up alongside the vessel and got some provisions down there. Then the cook called Andrew and he went up. After I was through with that I went up on the house again and I saw flames coming out of the after hatch. She was afire then. Then they all went down in the boat and all hands cut the boat adrift, rigged up the mast, and started to sail. The cook helped us to rig up the mast and sail. He was armed all that time with pistols. I do not think any other members of the crew had pistols. I did not see any of them have pistols. When we left the ship Andersen fired some shots. I do not recollect what he said when he fired them. There was a dog taken along in the boat. I do not know whose dog it was, but it was the only one that was on the *Olive Pecker*. The Spaniard was at the tiller when we left the burning vessel. We could see the light from the burning vessel the whole night. There were no vessels sighted after the bodies of the captain and mate were thrown overboard which could possibly have picked up the bodies. The bodies were dead, in my judgment, when they were thrown overboard. We saw a steamboat that night about 8 o'clock in the evening. It was after dark. Andersen took hold of the tiller and steered off to keep away from the steamboat. He said, when he did that, "*If they come and pick us up I will pop them*," or something like that. The next day we were told by Andersen to say, if we were picked up, that the vessel caught on fire and the captain and mate went down in the poop to see how it was, or something like that; that the mate came up in

flames and jumped overboard and the captain never came up any more. We were in the open boat about thirty hours after leaving the vessel before reaching land. We reached land the evening of the day after we left the vessel, about dark. We made tents of the boat sail and spent the night on the shore. The next morning we drew lots to see who should go partners. It fell to my lot to go with John Andersen, the cook. John Andersen and I started off together. The first place we went to was a small village, but we never stopped. The first place we stopped was Belmont. At Belmont John Andersen sold the captain's watch. I do not know if it was the captain's watch; *he sold a watch.* He sold a watch; I don't know whether it was the captain's watch or his. The dog went along with us. *He got sick the first day and John Andersen shot him.* Afterwards we met a gentleman and he promised to give us passage to Bahia on a schooner. He did so, and we came to Bahia. John Andersen shipped on a Norwegian ship, called the *Bernadotte*, bound for Pensacola, in the United States. I shipped the next day aboard a Brazilian brigantine. I was arrested the same day and John Andersen was also arrested, and we were taken up to prison. A couple of days after that the other men came there, and then we was up to give our statements to the consul in Bahia. Then we were sent to prison, waiting for the man-of-war to come and take us. The *Lancaster* did come, and we were all put aboard of her at Bahia and first landed in the United States here in Norfolk. We were turned over to the United States marshal and have been imprisoned here ever since.

In his cross-examination (Record, pp. 25–30), Lind gives an account of the difficulty between the cook and the captain that morning about the captain's dog. About 8 o'clock the captain's dog was down by the galley door and the cook threw some water on him. The

dog ran up on the deck load "hollering." The captain came up and said to the cook, "Did you throw hot water on that dog?" Andersen replied that he did not throw hot water on him: it was cold. The captain felt the dog's back and then called the cook a liar, cursed him, and struck him. Lind did not see the captain strike the cook, but heard the noise in the galley. (Record, p. 29.) Shortly after this the cook appealed to the mate, saying, "Won't you protect me till we get to port?" To this the mate replied, "Get to port? You will get killed anyhow," or something like that. (Record, p. 25.)

ANDREW MARCH, a sailorman from Newfoundland, was in his bunk when the cook called the mate down from aloft (Record, pp. 31 to 34):

> I was in my bunk that morning when I heard the steward calling Mr. Saunders down from aloft. *He sung out to him.* "*Mr. Saunders, come down from aloft*," just like that. He says, "*Mr. Saunders, come down here.*" I got out of my bed, went to the forecastle door, and looked upon the deck load, just forward of the main rigging, and saw the steward standing there on the deck load, somewhere aft of the forward cabin. He was armed. When he called Mr. Saunders down, I heard the mate ask him what he wanted. He says, "*Come down here.*" I went back to my bed then, and never heard nothing before *Mr. Saunders asked him what he had in his hand, and he told him "guns."* I was then in my bed in the forecastle. I heard him tell the mate, *when he was asked where he got the guns, that he got them in the cabin.* He was asked who they belonged to, *and he said the captain. He asked what he was doing with them, and he answered with a shot.* When I heard the first shot, I heard Mr. Saunders begging him, "*For God's sake, don't shoot me.*" He shot three shots after that. I was standing in my berth then.

I know the cook was on the house at that time. After the shooting the cook came and called us out of the forecastle. He says, "Come out here, boys, lower the boat, and put me ashore. *The captain and mate is dead, and I am in charge of this ship.*" I got out of the bed and put on my shoes in a hurry, and the cook came back a second time and says, "Come out here, won't you? Come out here, Manuel," and he says, "Yes." We went out and went on the top-gallant forecastle, and he ordered us to throw the mate overboard. The mate was lying on the forecastle head, on the left-hand side. The sails of the vessel were swinging at that time to the starboard, which left the left hand side of the vessel clear back to the wheelhouse. The cook was armed when he ordered the mate's body to be thrown overboard, and he claimed then to be in charge of the vessel. I do not remember whether he caught hold of the mate's body and helped to throw it overboard or not. *The mate had a marlin spike tied around his neck when the body was thrown overboard. A marlin spike is a big awl used to stick through the rope in splicing it. When it is used by a man going up and down the rigging a half hitch is taken over the point so it won't stick in his legs or get between the rigging going down. When it is around the man's neck it is tied with a string and with a half hitch on the point. He can't use it without taking the hitch off so as to hurt anybody with it. The top of the forecastle house, where the cook was standing when he shot the mate, is about three feet higher than the forecastle deck, where the mate was standing when he was shot.* To get to where Andersen was when he shot, the mate would have had to step up those three feet on top of the forecastle house. * * *

After the mate's body was thrown overboard we were ordered to the cabin to take the captain up and throw him overboard. The cook was armed at that time. When the mate's body was thrown overboard *Andersen swore oaths at it.* When he swore

oaths at the body, the Spaniard asked him not to curse the body that way. We all obeyed the cook and went aft and found the captain's body in the after cabin. [Here the witness identified the diagram, showing the inside of the after cabin, and marked No. 2.] The captain's body was found sitting in his chair, dead, with both arms folded in his lap. *He looked as if he was alive, with his head back on one side and a wound in the left part of his head, about an inch above the left ear.* The captain was sitting in his chair near the sofa on the starboard side of the vessel, the point marked on the diagram "A." John Andersen ordered the captain's body to be taken up and thrown overboard. Andersen was at that time armed. He assisted in throwing the body overboard. *He swore at it when the body was thrown into the sea, calling it "a mean bastard."* After the body of the captain was thrown overboard the steward ordered us to get ready the boat. He then invited us down into the cabin to get a drink of whisky. There was about two-thirds of a bottle of whisky. He drank with us. After that was done the boat was got ready. Kerosene oil was thrown over the deck load, and the ship was set on fire. Then we made for land in the sailboat. It was about two hours, I think, after the bodies were thrown overboard before we left the *Olive Pecker.* At the time these bodies were thrown overboard there was no vessel in sight which could possibly have picked them up. We sighted a steamboat that night while in the sailboat. The Spaniard had hold of the tiller, and seemed to be steering for the steamboat. John Andersen took the tiller, jibed the sail over, and very nearly capsized it. We then ran away from the steamer, and then lost sight of her. The *Olive Pecker* was burning a long time after we left her. We could see the light from her the next morning about daylight. *When in the sailboat going to shore, John Andersen made up statements that we should say if picked up. He told us to*

say that the ship caught on fire, and the captain and mate went down to put it out. The mate came up and jumped overboard, and the captain never came back. We sighted land about 5 o'clock in the evening of the day after leaving the vessel. We got to shore after night. * * *

That morning, before the captain was shot and before the mate was shot, I heard a difficulty between the cook and the captain about the captain's dog. As I was going forward from taking my dishes back from my breakfast, I heard the dog holler. I was standing on the forecastle house. I saw the dog come out and run aft. The captain came out and went to the galley and asked the cook if he had been throwing water on the dog, and he said no. The captain went back and felt the dog. Then I saw the captain go in the galley, but I did not know what he did there. This was about fifteen or twenty minutes, I think, before the captain was shot. * * * The cook's room on board the ship was in the after cabin, the same cabin in which the captain had a room. The cook waits on the captain and cooks for the officers and seamen aboard the ship. After the mate and captain were killed, John Andersen, the accused, *said he was in charge of the vessel.*

On cross-examination:

He testified that the water was thrown on the dog about half past 8. I turned in after this dog adventure, and the first intimation I had was hearing the cook calling Mr. Saunders from out of the rigging. I heard the cook calling Mr. Saunders from out of the rigging, and got up and poked my head out of the forecastle door. I saw the cook standing there with two revolvers in his hands, and I then turned and went back to my bunk. I did not look any more. I turned in because it was my watch below. Anyway, I saw this man standing there with two revolvers in his hand. *I didn't want to have any*

thing to do at all with his business at that time. The first thing I saw, after turning in my bunk and being called out, as I said, was Mr. Saunders lying out on the forecastle deck. He was dead. *There appeared to be no life in him.* I say this man intimidated us all at the pistol's point. He ordered us to throw the mate overboard. I obeyed his orders, because I wanted my life a little longer. After the captain was thrown overboard, we all went into the cabin and took a drink. I can't say that we took a drink at the pistol's point, but he made us throw the mate's body overboard. *He did not tell me that he would kill me if I did not, but I knew enough to know he would do it.* There were four of us altogether. I did not have a knife. I do not know whether I went ahead or who went ahead when we went into the cabin to take a drink. We had to throw the body of the captain overboard because the cook ordered us to do it. I took orders from the cook because he gave me to understand he was in charge of the ship. *At the time I knew he was, because he had all the guns.* It makes a big difference when he had all the arms.

JUAN DE DIOS BARRIAL, a Spaniard, was lying down when the shooting occurred (Record, pp. 36–38).

I heard the cook sing out in the door, "Come out here, boys! Come out here, quick!" "Yes, sir," says I, "let me finish dressing." He says, "Come out here. *I am in charge of the vessel.*" I went out and the first thing I saw was the mate lying on the top of the forecastle deck on the left-hand side, *with his face downward.* The cook says, "Throw him overboard," and then I says, "*Don't, cook; don't throw him overboard, he's alive.*" He says, "Throw him overboard; he's dead enough." We threw him overboard, and after we threw him overboard the cook says, "Now, go aft and pick the captain up." When he threw the body overboard *he cursed at the body.* Then he ordered the men aft to throw the

captain overboard. All the while he was armed with pistols. We went upon his orders and into the captain's cabin. When we got in the cabin we saw the captain sitting in his chair *with both hands in his lap* and his head leaning slightly to one side and on his breast. *I thought he was alive.* I saw he had a bullet to go through near the left side of his head. His body was taken up and thrown overboard. When his body was thrown overboard *the cook cursed it also.* After it was thrown over he said, "Come on, boys, I will give you a drink." We took a drink, and after we took a drink all came on deck, and I said, "We will make the stay sails and the topsails fast, and if a squall strikes her we can manage the other sails, and we go right into Rio de Janeiro, or Bahia. I sung out to Martin Barstad at the wheel, "Keep her off," and the cook says, "No; I don't want to go to the land." He was standing close to the rail, and he said, "*Do you want me to be hung? There is nothing to be done but destroy the vessel,*" he said. Then he called me and said to me, "You are the sensiblest man on board this vessel, and I want to speak to you." "All right, cook," I says. He took me on top the galley and says, "I am a murderer, and I killed these people to save my life and your lives. *Now, you fellows,*" he says, "*you are guilty of helping me throw the bodies overboard, and before you leave the vessel you will be as guilty as I am. You ain't got nothing to fear.*"

Says he, "Many a vessel leaves port and they don't know where they go, and there's nobody to look after us for a long, long time, and we will have time to run away." I told him I had nothing to fear with the vessel in port. I says, "Look here, cook; destroy the vessel; it's a terrible thing; it's worse than what you have done already. Call all hands here, and tell us what you want to do and where you want us to sail ashore, and we will help you as much as we can, and let us go into

port." "No, no," he says, "that won't do, the vessel must be burned." He ordered a small boat to be made ready, and everything was made ready and then he took us down into the cabin, and he says, "I didn't kill these people to rob the vessel. I grant you all fellows clothes out of this large chest," and we went in and everybody took some clothes and the cook says, "You fellows can put on your best clothes," and he gave me a suit of clothes, and he says, "You don't want to take anything;" so we went forward and put on our best suit of clothes, and the cook had us to pour oil on the deck. The cook called us to hurry up and spread the oil on the deck. I didn't want to do this. I went to the forecastle and the cook came and said, "What are you doing there? Come and give your hand with this oil." I says, "Yes, cook; let me finish shaving, and I go." When I went on deck I could see that the oil was all ready. It had been spread over the deck. The cook then told us to lower a boat, and it was lowered, and Andrew March unhooked the tackle and we took the boat alongside the vessel and I jumped in, too. Provisions were then put in the boat, and when everything was ready Andersen called to me, "Come up and light the fire." "Well," I says, "let me keep the lookout on the boat; it might smash against the vessel." So he called Andrew March, and the first time he called Andrew he did not come, *so he called him again in wild words and March went up.* John Lind put the boat right in the stern of the vessel. I was in the boat, and I don't know who set the vessel on fire; but she was on fire when we sailed away. I saw the light from her burning late in the night. When we sailed away from the boat I had charge of the tiller of the sailboat. It was about two or three hours after the captain and mate were thrown overboard that we left the vessel. After dark that evening we sighted lights of a steamer coming toward us. I was steering the sail-

boat to go for the steamer. When John Andersen saw this he took the tiller away from me, and in doing so jibed the boat and almost capsized her. We reached the shore on the coast of Brazil about thirty hours after leaving the burning *Olive Pecker*. We spent the night on the shore, making tents of the sail of the boat. When leaving the burning vessel John Andersen fired his pistol three times, saying, "That's American man-of-war style." While going to the shore in the sailboat he told the men if they should be taken up they must say that the *Olive Pecker* caught fire, and that the captain and mate went down in the hatch to put her out, and the captain never came up, and the mate came up with his clothes afire and jumped overboard.

Testimony of Horsburgh, the engineer, is to be found in the Record, pages 40 to 53. Horsburgh was asleep in his berth in the after cabin, the second mate's room, when the captain was shot. What he supposed was the noise of the shooting of the captain awakened him. Then Andersen came to the companionway and told him to come on deck, that he had killed the captain. (Record, p. 42.) Horsburgh came on deck and went forward along the starboard side into the forecastle, where he told the crew that the cook had killed the captain. Directly after this he heard the shots on deck, and then the cook sung out for the men to come on deck, saying (Record, p. 43), "Come out boys; I am in charge of the vessel;" and ordered the mate's body to be thrown overboard. The mate was lying on the port side of the forecastle head, with his face down, a marlinspike hanging about his neck. After the mate's body was thrown overboard the cook ordered them to go aft and throw the captain's body overboard. "We went down in the cabin and found the captain in the chair;

so we took him up on deck and threw him overboard. Then after that he told us to go down and he would give us a drink; so we went down in the cabin and had a drink." After that the cook ordered them to get the boats ready, with provisions, etc. About this time the cook sent Horsburgh to pump March. "This is the expression he used: 'Go to pump Andrew March.' He said he was frightened of Andrew March, and told me I was freckle-minded." (Record, p. 45.) Horsburgh went and told March to be careful what he said to the cook. Horsburgh's story of the burning of the vessel and the escape in the open boat to the Brazilian shore is that of the other members of the crew.

In his cross-examination, Horsburgh describes the difficulty between the captain and the cook about the captain's dog substantially as already given.

The testimony of the accused, Andersen, appears in the Record on pages 56 to 93, the main statement being on pages 58 to 65. On page 58 he describes the altercation with the captain about the dog. In trying to throw water on the dog, the bucket slipped and struck the dog, which ran howling. This brought the captain, who cursed him and struck him in the side, and sent him on top of the pots and pans on the hot stove. The captain cursed him and threatened him; and he plead with the captain not to hurt him. The captain left him standing and the mate came along, so he turned to the mate and said to him, "Mr. Saunders, won't you protect me until we get into port?" The mate turned around to him "with scorn," saying "Go to hell; you will get killed anyhow." The cook stood in the galley among the dirty dishes, looking around to see if there was any vessel, thinking if he could see one "he would

take a board and jump overboard." It was then twenty five minutes to 10 o'clock. (Record, p. 59.) He then thought of the cabin. He used to sweep and dust the cabin before 9 o'clock:

> So I started into the cabin, thinking that the captain would be on deck, and I came down in the cabin. He was sitting inside of the door in a chair like this, although bigger, and he had a bottle on this here lounge which was alongside of the stool or the chair. He glared at me and he looked fairly black in the face with rage. He blurted out and cursed me when I came into the cabin. Well, I didn't know what to do. If I should run on deck I would have to run overboard; that was the only way I have to see out of it. I commenced sweeping the cabin, and started into the mate's room first. *I saw the mate's gun lying on the shelf, and I took that down, thinking if worst comes to worst, I will have to defend myself.* So I finished the cabin and started into the captain's room. I passed by him in that direction [indicating by gesture], and he took up that bottle like this. He says, "You whore's son!" Then he took it up like this, as if to split my head open, *when I pulled my gun out and fired.* The bullet struck him in the left temple. He fell into the chair and I ran into the captain's room. *Then I thought about the mate. I ran into the captain's room then and got his two guns.* He used to keep one gun in under the pillow and one on the shelf. I ran up on the deck, and I didn't know where the mate was then. I came up to John Lind, and he was at the main rigging. *I says,* "*Where is the mate?*" He says, "*He is aloft.*" I looked up there, and I think I said something of calling him down, but I don't think I did do that. The mate came down, and before he came down to the , piece next to the rail, he says, "*Where in the hell did you get them guns?*" He says, "*And where is the captain?*" I never made no answer to him, but I stayed *on top that house there* as the mate came down, and

he had this marlin spike around his neck. I will just show you how he had it, if you please. He had this hitch on this marlin spike, as represented to you before. He came down like this, and walked up like this [indicating by appropriate gestures] (walking toward the bowsprit), and turned in this direction (to the right) and came toward me in that direction (on the starboard side). He took the half hitch out of the marlin spike like this, and the marlin spike was hanging down when he came toward me. *I was standing there and had the guns then.* I had three of them and I held them in my hand all the time. I had an apron around my waist, and I had no pockets here in the pants. He got this hitch off the marlin spike and came around to me like this [indicating by proper gesture] to take the marlin spike off his neck and shove the marlin spike into me. I pulled the gun and shot him. The first shot struck him here somewhere (in the side). He was still coming toward me, and I shot twice or three times altogether, when the man fell dead. * * * So I stood there, and John Lind—he was the man that came up first, and there was nobody else came up—so I says, "Men," I says, "ain't you coming up?" I says. In the condition I felt, I felt actually frightened of the men the way I was, because I was completely gone. *We throwed the mate overboard.* I helped them also, so far as I can remember. *And we took the captain out of the cabin and threw him overboard.*

It is unnecessary to quote Andersen's account of the burning of the vessel and the trip to shore. On cross-examination, Andersen admitted that he was about 3 feet from the mate when he shot him (Record, bottom p. 66); that he was standing on the forecastle house and the mate was down on the forecastle head (Record, p. 68). He admitted that in his statement before the American consul at Bahia, he said he got the pistol that killed the captain out of his own trunk, the fact being it was the

mate's pistol which he got in the mate's room (Record, p. 71). He admitted stating to certain gentlemen that when the captain raised from his chair to strike him with the beer bottle he was facing him (Record, bottom p. 75). He admitted that as soon as he had killed the captain, *what came into his head then was the mate* (Record, p. 76); that he got the captain's pistols; that he ran up on deck, through the pilot house where Barstad was, and up to Lind, who was standing amidships, *whom he asked where the mate was* (Record, top p. 77); that Lind told him the mate was up aloft; that he went forward and got on top of the forecastle house, and said something to the mate in the excitement; that he might have called him down (Record, p. 77).

On page 78, Record, the admission is repeated that he left the captain's cabin and ran forward on the deck load and called the mate from the rigging, where he saw him. He denied asking the men to throw the mate's body overboard (Record, bottom p. 80), but admitted he asked them to throw the captain's body overboard (Record, middle p. 81). Andersen's opinion is that it might have been two or three minutes after the mate was shot before his body was thrown overboard. He denied asking the crew to take a drink (Record, p. 82), while he admitted he may have got the whisky (Record, p. 83). He denied ordering the vessel burned, and said it was at the engineer's suggestion (Record, bottom p. 84); but admitted that he went to the Spaniard and to Lind and asked them whether they were willing to have the vessel burned (Record, p. 88). He admitted that he took the captain's watch and sold it in Belmont (Record, p. 93), and that the compass was thrown overboard before they reached the beach.

The importance of a clear understanding of the testimony in this case will become apparent in considering the really important assignment of errors. The errors assigned are set forth specifically in the Record, pages 126 and 127. I shall consider them briefly in order.

ARGUMENT.

ERRORS ASSIGNED.

I. DEMURRER TO INDICTMENT.

It appears from the record (pp. 3, 11)—

> Thereupon the said accused demurred to the said indictment on the ground that it does not specify the locality on the high seas where the alleged offense occurred, and for other reasons not assigned. Thereupon the United States joined in said demurrer as to the said cause so assigned and objected to the same being in any wise considered, for any reasons not assigned by the accused.
>
> Thereupon, after argument, the court overruled the said demurrer for the cause assigned as aforesaid, and admonished the accused that he must state any other grounds of demurrer on which he relied, as the court could not otherwise consider them. No other grounds being alleged by the accused, the said demurrer was thereupon overruled.

The indictment is to be found in the record, pages 1, 9. It is based upon the indictment in the case of *St. Clair* v. *United States* (154 U. S., 134, 135). In the St. Clair Case the accused were charged with murdering one Maurice Fitzgerald on board the bark *Hesper* on the high seas by striking and beating Fitzgerald with a weapon unknown, and thereby giving him several grievous, dangerous, and mortal wounds, and then and

there casting and throwing him from the vessel into the sea and drowning him, "of which said mortal wounds, casting, throwing, plunging, sinking, and drowning the said Maurice Fitzgerald, in and upon the high seas aforesaid, out of the jurisdiction of any particular State in the United States of America, then and there instantly died."

In the present indictment, in place of the mortal wounds inflicted by an unknown weapon, we have the mortal wounds inflicted by a pistol.

The indictment, with formal averment, charges that Andersen murdered Saunders by assaulting him with a pistol, with intent to kill him, whereby he inflicted upon Saunders—

> several grievous, dangerous, and mortal wounds; and the said John Andersen, alias John Anderson, did then and there, to wit, at the time and place last above mentioned, him, the said William Wallace Saunders, sometimes called William Saunders, piratically, feloniously, willfully, and of his malice aforethought, cast and throw from and out of the said vessel into the sea and plunge, sink, and drown him, the said William Wallace Saunders, sometimes called William Saunders, in the sea aforesaid, of which said mortal wounds, casting, throwing, plunging, sinking, and drowning the said William Wallace Saunders, sometimes called William Saunders, in and upon the high seas aforesaid, out of the jurisdiction of any particular State of the United States of America, then and there instantly died. And the grand jurors aforesaid, upon their oath aforesaid, do say that by reason of the casting and throwing of the said William Wallace Saunders, sometimes called William Saunders, in the sea as aforesaid, they can not describe the said mortal wounds with greater particularity, etc. (Record, bottom p. 10, top p. 11).

I submit that the second ground of demurrer, that the indictment states the homicide was committed by shooting and drowning, which are inconsistent means, can not be now urged, because that ground was not presented to the trial court, but if it can be urged there is no merit in it. There is no inconsistency nor obscurity in the indictment in this respect. The indictment charges that the accused shot the deceased with a pistol, and then immediately threw his body into the sea. The murderous act was continuous. It was the same as if Andersen had shot the mate while he was in the rigging and he had fallen from there into the sea. Under such circumstances it would be impossible to tell whether he was dead before he struck the water or not. If, under the circumstances shown in this case, it is necessary for the indictment to charge and the jury to find that the murdered man was either killed by the shots or drowned in the sea, the Government being required to elect and prove the specific cause of death, then conviction becomes an impossibility.

Among the uncontroverted facts set forth in the bill of exceptions are these (Record, p. 8):

Between 9 and 10 o'clock on that morning Captain Whitman was shot in his cabin, and shortly thereafter the mate was shot on the left-hand side of the forecastle head and his body *immediately* thrown into the sea.

II. THE SPECIAL VENIRE.

The record shows, page 12:

> Whereupon the prisoner, by his counsel, moved to quash the writ of venire facias for the petit jury to be used in the trial of this particular case, on the ground that said writ must show that this said venire were summoned for the trial of this particu-

> lar case and not the general venire for offenses in general to be tried at this term of the circuit court of the United States for the eastern district of Virginia. On consideration whereof the court overruled the said motion.

Then follows the list for the venire referred to. The brief of the opposing counsel is not based upon the record, but raises a new question, namely, "that it does not appear that the jury was authorized by any order of court."

This is not only new matter not based on the record, but is not justified by the history of the case. There was an order of court directing the jury to be summoned. It was not printed in the record, because the accused raised no question and assigned no error requiring it to be made a part of the record.

There is no law requiring juries to be summoned before the term begins. There is no law requiring the name of the particular person or persons to be tried to be inserted in the writ. It is true the writ for this jury was issued December 6, 1897, after the commencement of the November term, but it was issued pursuant to an order duly entered on December 2, 1897. The jury was not ordered for the sole purpose of trying John Andersen, but was directed—

> To be and appear before our judges of our circuit court of the United States for the said district of Virginia, at the fall term thereof, to be holden at Norfolk, in the district aforesaid, on the 15th day of December, 1897, to serve as petit jurors of said court at said term.

Counsel cites no pertinent law under this assignment. Section 803 has no proper bearing. The record shows that the jury was formed and impaneled in strict ac-

cordance with section 804. See minutes of trial (Record, p. 4), as follows:

> Thereupon the petit jurors heretofore summoned to attend upon this court were called and each one examined on his oath touching his qualifications to serve in this case, and from challenges and otherwise a sufficient number of jurors not being obtained, it was ordered that the marshal of this district or his deputy return forthwith jurymen from the bystanders sufficient to complete the panel.
>
> Thereupon the jurors so returned by the said marshal being each examined upon his oath as to his qualifications to serve as a juror in this case, a panel of 37 jurors were found duly qualified and free from exception. Whereupon the prisoner struck from said panel 20 of the said jurors and the United States, by its attorney, struck therefrom 5 others, leaving 12 of the said jurors duly qualified to serve.

No exception was taken by the accused to the jury so impaneled. He exercised his challenge, and when "twelve jurors qualified to serve" were sworn no exception of any kind was interposed. If the objection to the form of the writ summoning the jury had merit, it is submitted that the failure of the accused to except to the jury as selected was a waiver of this objection.

III. THE TESTIMONY OF HALL DESCRIBING THE VESSEL.

A. J. Hall testified that he built the *Olive Pecker* and sailed her for seven years. He described the vessel, the relation of the several parts to one another, so that the jury might understand the evidence of the witnesses. In connection with Hall's testimony certain diagrams of the vessel and an oil painting of it were introduced without objection. In view of his knowledge of the vessel he testified that, with a deck load of lumber a cer-

tain height, and with the vessel on the port tack, a man in the wheelhouse could command a view of the port side.

After Hall had given his testimony counsel for the prisoner moved "to strike out all testimony as to the condition of the vessel at the time of the casualty." (Record, top p. 15.) Counsel for the Government insisted that he had asked the witness nothing about that, and Judge Goff said (Record, p. 15):

> The court does not understand that he has so testified. *Anything that would bear that construction as a matter of course will be excluded from the jury.* I think it is eminently proper that the jury should understand the character of this vessel. This man is familiar with it; he built it; he has commanded it. He is detailing to the jury nothing that took place at the time of the alleged offense. He is giving the general character and situation of the vessel, so that you may understand it, which, I think, is eminently proper. As he was not on the vessel at the time of this occurrence the court will not permit him to testify about anything that took place then.

It was to this ruling the prisoner excepted. He is incorrect in stating in his brief at the bottom of page 3 that he moved to "strike out the testimony as to what was customary." He did just what the record shows—moved to strike out all the testimony as to the condition of the vessel at the time of the casualty. This motion was sustained by the court, but at the same time the court held that the testimony of Hall as to the character and situation of the vessel was competent, and in this he followed the holding of this court in the Bram Case (168 U. S., 532, 568) as to certain testimony introduced with respect to the vessel *Herbert Fuller*.

IV. TESTIMONY OF JOHN LIND.

In the cross-examination of John Lind, counsel for the accused was permitted to bring out all that occurred between the accused and the captain, and the accused and the mate, *on the day of the murder*. He narrated the trouble about the captain's dog, and the appeal of the cook to the mate for protection, and the mate's answer. It appears in the record, page 29, that the accused's counsel asked the witness to state what occurred between Anderson and the captain *that morning*, and the court said: "You may ask it." "We want all the facts in the case." After the witness had stated all that had taken place that morning, he was asked this question (Record, top p. 30):

> Do you know of any other circumstances? Had this captain been brutal or inhuman to this cook in any other way?

To this question the district attorney objected on the ground that the character of the captain and his treatment of the accused prior to this time was not an issue in this case, which was a trial for the killing of the mate, and was not a part of the *res gestæ* of this case. This objection was argued by counsel, but the court sustained the objection and ruled out the question, to which ruling counsel for the accused excepted (Record, p. 30). After this ruling counsel for the accused put other questions, prefacing them with the statement:

> I mean by the interrogatories I am going to propound now to confine myself to *that morning*.

It needs no argument to sustain the ruling of the court in this respect. Opposing counsel uses language which tends to lead this court to believe that there was

certain testimony relating to the transactions on the day of the murder which was excluded. All that occurred that day was admitted. What was excluded was the transactions between the captain and the cook prior to the day of the murder. In what way could this operate to justify or mitigate the murder of the mate?

V. OVERRULING MOTION TO DIRECT VERDICT NOT GUILTY BECAUSE DEATH RESULTED FROM SHOOTING AND NOT FROM DROWNING.

The indictment alleges that Andersen murdered Saunders by shooting and drowning him. After the Government had rested its case the accused moved the court to instruct the jury to bring in a verdict of not guilty, because the indictment charged that the mate met his death by drowning, whereas the proof showed that his death resulted from the pistol wounds. This motion the court overruled, and very properly.

In the first place, the indictment did not charge the death from drowning alone. It charged the death from shooting and drowning. In the second place, the testimony did not show conclusively that the death resulted from the pistol wounds—in other words, that the mate was dead before he was thrown overboard. Some of the crew thought the mate was dead. None of them knew he was dead, because there was no time for an examination. After shooting the mate, Andersen called the crew on deck, and ordered them, at the point of his pistols, to throw the mate overboard. The mate was then lying face down. Nobody examined him to see whether he was dead or not. They simply picked up his body and threw it overboard.

It is a conceded fact that the mate was shot and *immediately* thrown into the sea. (Record, p. 8.)

Some of the witnesses thought the mate was dead; some thought otherwise. Lind, when asked how he knew the mate was dead, said: "There was no move at all." "His hands were white." (Record, top p. 31.)

Barstad was doubtful, saying (Record, top p. 21): "I can't tell if he was dead when they threw him overboard."

March said (Record, middle p. 34): "He was dead. There appeared to be no life in him."

Barrial says (Record, foot p. 36):

> The cook says, "Throw him overboard," and then I says, "Don't, cook, don't throw him overboard; he is alive." He says, "Throw him overboard; he is dead enough."

Horsburgh says (Record, p. 51) that the mate "appeared to be dead."

VI, VII, VIII, IX. EXCLUSION OF TESTIMONY.

These assignments are similar to the fourth assignment, and grow out of the fact that the court refused to allow the introduction of evidence of the transactions of the entire voyage, limiting the testimony to the transactions of the day of the homicide. The questions were asked the accused on the stand, and were as follows (Record, p. 57):

> Now, I want to ask this question (to the witness): I want you to detail with truth to the jury everything that occurred in reference to this business, from the time you shipped on the 16th day of June until you left the vessel on the 6th day of August.
>
> (Objected to by the attorney for the United States as irrelevant, and on the ground that the Government was confined in its testimony to what occurred on the day of the alleged homicide, and that the

accused should be required to conform to the same ruling of the court.)

After argument by counsel, the court ruled as follows:

> Judge GOFF; "I have no objection to your having the accused commence in his own way and detail as to him is best, confining himself to the truth, just what took place there on the morning of that day, and without any assistance from you; but I can not permit him to detail to the jury the incidents of the voyage from the time they left Boston in June, as I understand your question to indicate."

After some discussion, counsel for the accused renewed the question, and the court said (foot p. 57):

> I must say, Mr. McIntosh, that I fail to see the pertinency of testimony as to a quarrel with the captain in June or in July. Suppose the mate was a party. The charge is that of killing Saunders in August, and the testimony must be confined to that time. You can show, if you can, what was the feeling between the accused and the mate, and that it was such growing out of previous quarrels or threats by the mate to take the life of the accused, or anything in that line which would tend to explain the standing of the parties at the time of this occurrence. Now, anything that bears upon what had taken place, so far as the mate is concerned, can go before this jury.

On page 58 of the record it appears that counsel for the accused put this question:

> Now, state to the jury all that occurred between you and the mate during that time, including all the facts and circumstances attending the 6th of August.

Counsel for the Government objected to the part of the question intended to elicit what occurred between

the mate and the cook from the time they left Boston. Then follows this from the court:

> The trouble, Mr. McIntosh, is this: In the presen condition of the testimony of this witness it is hard to see the pertinency of it now, but I do not say that it may not be pertinent. You had better first let the witness detail the transactions of the 6th of August, and if anything is developed thereby which makes it proper to bring in the previous incidents as tending to explain what took place on the 6th, it can come in.

After this the accused gave his account of the transactions the day of the homicide. After he had got through with this his counsel renewed the question (Record, p. 65):

> Now, state what trouble, if any, you had had with this mate previous to this occasion?

This question was objected to by counsel for the Government on the ground that the testimony of the witness should be confined to what occurred on the day of the homicide, and after some discussion Judge Goff delivered this opinion (Record, foot of p. 65):

> The reason I suggested to counsel for the accused that the statement as to the occurrences relating to the killing of the mate should be stated as they took place on that day, was that the testimony might be confined to a certain limit. Now, there is no doubt in the world that a party may protect his own life against the party assailing him. If he believes that he is about to suffer harm from one who is attacking, if he bases that belief upon a previous threat, if he bases that upon previous personal encounters, if he bases that upon the known brutal character of the party, the law, out of tender consideration for the frailties of human nature, will

permit him to act upon that belief and upon that understanding. But can we apply that in this case? Now, we must look at the matter as it is before the jury, as it is presented by this witness. The witness states that he had a controversy with the captain; that the captain was cruel to him. Then in that hour he turned to the mate and advised with the mate; he asked the protection of the mate. His conduct at least does not indicate that there was any feeling between him and the mate at that time. If the testimony is admissible, it is upon the theory that it must tend to explain the situation as it then existed. He had turned to the mate to ask his protection from the captain. Now, if the mate had attacked him, it would be perfectly competent for Andersen to show that the mate, previous to this day, had threatened him or had been cruel to him. We must look at the testimony as the witness has given it himself. It was the witness who sought the mate, not the mate who sought the witness. I fail to see how a party can, under those circumstances, show, either by himself or by another, that he had had a controversy with the party he is about to attack the day before or the week before, if he has had time to cool. If there had been a controversy of that kind, even under any circumstances of that kind, it does not authorize a party to take the law into his own hands. I must exclude the testimony and adhere to the intimation I gave some time ago on another ruling with reference to threats.

Directly after this ruling counsel for the accused asked the question (Record, p. 66):

> I want to ask you whether, on the day before you had a difficulty with the mate, and without provocation on your part, the mate had not attempted to throw you overboard?

Of course, this question was held improper.

It really seems as if the mere statement of the evi-

dence introduced, and the rulings of the court excluding any evidence of transactions before the day of the homicide, were sufficient to enable the court to determine properly the questions raised by these assignments.

What occurred before the 6th of August was no part of the transaction of that day. Neither did the story of Andersen lay the ground for testimony of previous transactions between him and the captain or between him and the mate.

Andersen testified in his own behalf thus: About 8 o'clock he had a difficulty with the captain about the captain's dog. The captain accused him of lying, cursed him, and struck him. No serious injury was inflicted. The mate was not present, but afterwards, when he came where Andersen was and Andersen asked for his protection, he declined with an oath to interfere. About an hour afterwards Andersen went down into the cabin. The captain looked black at him—cursed him. He then went into the mate's room and armed himself with the mate's gun. Returning into the captain's cabin, the captain arose and was about to assault him with a beer bottle when he shot and killed him. *Then he thought about the mate.* He ran into the captain's room and got his two pistols. He rushed on deck, hurried to Lind, who was amidships, and asked where the mate was. He was told the mate was aloft. He looked up and saw him there. Then he went near the foot of the mast, on the forecastle house. He called the mate down, or if he did not call him down, he waited for him.

Before the mate got down he asked Andersen where he got the guns and where the captain was. Andersen says he made no answer to this, but stayed on top of the house. Then, as he stood on the house with the guns,

and the mate was three feet below on the forecastle head, unarmed, but trying "to take the marlin spike off his neck and shove the marlin spike into me (him)," he pulled the gun and shot him. He shot him three or four times, the mate begging him not to shoot. (Record, p. 67.) Immediately after that he called the sailors and threw the mate's body overboard.

Under such circumstances, taking this transaction just as Andersen gives it, it would have been subversive of all precedents to admit evidence of transactions before the day of the homicide. Nothing which had occurred prior to that day could, under these circumstances, justify or mitigate the conduct of the accused. He armed himself for the purpose, went in search of his victim, and, finding him aloft on the mainmast at work, a position of absolute safety for the accused, called him down and killed him. He was not only the aggressor, but the forearmed and premeditated aggressor, and this upon his own showing.

It is true that he says, when he had thus armed himself, gone in search of the mate, called him from his work, stood at the foot of the mast armed and ready to receive him, that there was a marlin spike swung around the neck of the mate which he thought the mate was going to use against him, and to protect himself against the marlin spike swung around the neck of a man standing at least three feet from him, and three feet below him, he shot the mate and cast him into the sea. These are the facts upon which this plea of self-defense must be based. The poor mate was given no show. He was shot down unarmed and begging for his life. But suppose he had been armed with a deadly weapon, and had made toward Andersen as if to assault him, would

Andersen have been justified in killing him? Andersen was a mutineer. Andersen had killed the captain, and the mate knew it. Andersen had arms and was flourishing them—two guns in his hands, one in his pocket, and the mate knew it. The mate was called down; he knew what was awaiting him. If, under these circumstances, he had been armed and could have killed the desperate, dangerous murderer, it was his duty, as the officer in command of that vessel, to kill him.

Indeed, it was the duty of every law-abiding man to apprehend this outlaw. The danger to his life, which Andersen feared, was not from the mate, but from justice. It was not the marlinspike, but the rope, which confronted Andersen. To defend himself from the rope he killed the mate, cast his body and that of the captain into the sea, burned the ship, took to the open boat, gained the coast of Brazil, separated from his comrades, and shipped at the first seaport, under an assumed name, on a strange vessel. And all for naught.

> A homicide is not excusable on the ground of self-defense because of previous hostile acts or injuries, however violent, committed or inflicted by the person killed without any overt act showing danger to the slayer at the time of the killing. (Kerr on Homicide, sec. 172.)
>
> The plea of self-defense can not be interposed, and the homicide will not be justifiable where the evidence shows that the prisoner was the aggressor or that he acted in retaliation. (Ibid., sec. 172.)

The law, as laid down by this text writer, has been expressly approved by this court in *Addington* v. *The United States*, 165 U. S. Rep., 184. This court, recognizing the right of self-defense and defining it, held it did not apply in a case where the accused went to the

place where the deceased was for the purpose of provoking a difficulty in order that he might slay his adversary. The very term self-defense involves the idea of repelling some violence—some existing condition which can only be avoided by opposing force to force. When a man has proven that he has been assaulted, he is permitted to introduce evidence concerning the character of his assailant as a reason justifying his own conduct.

In this case the accused was not assaulted. He was not repelling violence, actual or threatened. He had, himself, gone where the deceased was for the purpose of a difficulty, armed with a deadly weapon, fresh from the killing of another man; gone where he saw the deceased up above him on the mast of the vessel at his work, in a position from which it was impossible for the deceased to offer him violence. Being there for the very purpose of inflicting injury upon the mate he called him down, and manifestly, from his own statement, for no other purpose than to assail him. Under such circumstances, if it were true from the evidence that the mate attempted to use the marlin pin around his neck, it would have been an act of self-defense on his part, and not an act justifying the conduct of the accused.

Another case peculiarly illustrative of the principle controlling in this instance is that of *Allen* v. *The United States* (164 U. S. R., 492); and also the case of *Harrison* v. *Commonwealth* (79 Va., 374).

Indeed this principle is nowhere more clearly enunciated than in the very case cited by opposing counsel in his brief, that of *Wallace* v. *United States* (162 U. S. R., 466), where the court uses this language: "Where a difficulty is intentionally brought on for the purpose of

killing the deceased, the fact of imminent danger to the accused constitutes no defense." This court in that case quoted with approval the language of the court in *Reed* v. *State* (11 Texas App., 509), as follows:

> A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong—if he was himself violating or in the act of violating the law—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense and regulates it according to the magnitude of his own wrong. * * *

Counsel for accused has much to say about the state of terrorism of the accused brought about by the cruel and inhuman conduct of the mate and the captain. The record discloses nothing justifying such an assertion. While it was of course impossible for the accused to go into the character of the captain, and probably not entirely admissible for him to inquire into that of the mate, the record shows that no effort whatever was made to inquire into the character of the mate with respect to illtreatment of sailors. The failure to make such an attempt justifies the inference that the mate's character was good; at least the record permits no other inference to be drawn.

X. EXCLUDING REPUTATION OF CAPTAIN.

Here the accused complains that he was not permitted to ask the witness John Darnhardt concerning the general reputation of the captain, Whitman. It is a

recognized principle that, as a general rule, the character of the deceased can not be inquired into. Certainly no authority can be found justifying an inquiry into the character or reputation of Captain Whitman, who had been killed by the cook immediately prior to the killing of the mate. It would not have been admissible, for the all-sufficient reason that, whether good or bad, it could have no legal bearing upon the issue made up between the United States and John Andersen for the murder of the mate, Saunders.

Had the inquiry been made as to the character of the mate, Saunders, the question would not have been admissible until the accused had first proved that without his own wrong he had been assaulted by the mate in a manner which laid the ground for a plea of self-self-defense. This is well stated in Wharton on Criminal Evidence, sections 68 and 69; also Wharton on Homicide, section 606.

XI, XII. INSTRUCTIONS OF COURT.

Under these assignments the accused complains of the instruction of the court, submitted in the following language (Record, p. 119):

> The other felonious homicide to which I call your attention, manslaughter, is the unlawful killing of a human being without malice, either express or implied. I find it to be my duty, gentlemen of the jury, to say to you that if the defendant has committed a felonious homicide, of which you are the only judges, there is nothing before you that reduces it below the grade of murder.

This instruction was based upon the charge of Mr. Justice McKenna, when sitting as trial judge in the case of *Sparf* v. *United States* (156 U. S., 51–60). It was used

in the case at bar because the testimony before the jury, both that of the crew and that of the accused himself, imperatively demanded it in the interest of justice. The testimony of the accused necessarily excluded the possibility of manslaughter. He testified that, having killed the captain, he at once thought of the mate, armed himself, rushed on deck, called him down from aloft where he was at work, shot him, and threw his body overboard. He did not claim that there was any quarrel that day between him and the mate. He did not claim the existence of any fact which would have operated in law to reduce the crime from murder to manslaughter.

The language of Mr. Justice Harlan in the Sparf case (156 U. S., bottom of page 63) is pertinent:

> Upon a careful scrutiny of the evidence we can not find any ground whatever upon which the jury could properly have reached the conclusion that the defendant Hansen was only guilty of an offense included in the one charged or of a mere attempt to commit the offense charged. A verdict of guilty of an offense less than the one charged would have been in flagrant disregard of all the proof and in violation by the jury of their obligation to render a true verdict. There was an entire absence of evidence upon which to rest a verdict of guilty of manslaughter or of simple assault. A verdict of that kind would have been the exercise by the jury of the power to commute the punishment for an offense actually committed, and thus impose a punishment different from that prescribed by law.

In *Stevenson's Case* (162 U. S., 313) this court, speaking by Mr. Justice Peckham, expressly reaffirms the doctrine laid down in Sparf's Case, as follows (p. 315):

> The jury would not be justified in finding a verdict of manslaughter if there were no evidence

upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect.

XIII, XIV.

The refusal of the court, first, to grant a new trial, and second, to arrest judgment, respectively, do not require discussion.

The judgment should be affirmed.

JOHN K. RICHARDS,
Solicitor-General.

ANDERSEN *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

No. 583. Argued April 11, 1898. — Decided May 9, 1898.

The indictment in this case, which is set forth at length in the statement of the case, alleged the murder to have been committed "on the high seas, and within the jurisdiction of this court, and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of

Statement of the Case.

America, in and on board of a certain American vessel." *Held*, that nothing more was required to show the locality of the offence.

The indictment was claimed to be demurrable because it charged the homicide to have been caused by shooting and drowning, means inconsistent with each other, and not of the same species. *Held*, that the indictment was sufficient, and was not objectionable on the ground of duplicity or uncertainty.

There was no irregularity in summoning and empanelling the jury.

There was no error in permitting the builder of the vessel on which the crime was alleged to have taken place, to testify as to its general character and situation.

As there was nothing to indicate that antecedent conduct of the captain, an account of which was offered in evidence, was so connected with the killing of the mate as to form part of the *res gestæ*, or that it could have any legitimate tendency to justify, excuse or mitigate the crime for the commission of which he was on trial, there was no error in excluding the evidence relating to it.

After the Government had closed its case in chief, defendant's counsel moved that a verdict of not guilty be directed, because the indictment charged that the mate met his death by drowning, whereas the proof showed that his death resulted from the pistol shots. *Held*, that there was no error in denying this motion.

While a homicide, committed in actual defence of life or limb, is excusable if it appear that the slayer was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased, and that his act was necessary in order to avoid death or harm, where there is manifestly no adequate or reasonable ground for such belief, or the slayer brings on the difficulty for the purpose of killing the deceased, or violation of law on his part is the reason of his expectation of an attack, the plea of self-defence cannot avail.

The evidence offered as to the general reputation of the captain was properly excluded.

As the testimony of the accused did not develop the existence of any facts which operated in law to reduce the crime from murder to manslaughter, there was no error in instructing the jury to that effect.

ANDERSEN was indicted in the Circuit Court of the United States for the Eastern District of Virginia, for the murder of William Wallace Saunders, on an American vessel, on the high seas, of which vessel Saunders was the mate and Andersen the cook.

The indictment charged that Andersen —

"On the sixth day of August, in the year of our Lord one thousand eight hundred and ninety-seven, with force and arms, on the high seas and within the jurisdiction of this court and

within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same being then and there a schooner called and named 'Olive Pecker,' then and there belonging to a citizen or citizens of the said United States of America whose name or names is or are to the grand jurors aforesaid unknown, in and upon one William Wallace Saunders, sometimes called William Saunders, then and there being on board said vessel, did piratically, wilfully, feloniously and of his malice aforethought make an assault, and that the said John Andersen, alias John Anderson, a certain pistol then and there charged with gunpowder and leaden bullets, which said pistol he, the said John Andersen, alias John Anderson, in his hand (but which hand is to the said jurors unknown) then and there had and held, then and there piratically, feloniously, wilfully and of his malice aforethought did discharge and shoot off to, against and upon the said William Wallace Saunders, sometimes called William Saunders, with intent him, the said William Wallace Saunders, sometimes called William Saunders, then and there to kill and murder, and that the said John Andersen, alias John Anderson, with the leaden bullets aforesaid out of the pistol by the said John Andersen, alias John Anderson, discharged and shot off as aforesaid, then, to wit: On the said sixth day of August, in the year of our Lord one thousand eight hundred and ninety-seven, and there, to wit: On the high seas as aforesaid, in and on board of the said American vessel, and within the admiralty and maritime jurisdiction of the said United States of America and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the United States of America, piratically, feloniously, wilfully and of his malice aforethought did strike, penetrate and wound the said William Wallace Saunders, sometimes called William Saunders, in and upon the head of him, the said William Wallace Saunders, sometimes called William Saunders, (and in and upon other parts of the body of him, the said William Wallace Saunders, sometimes called William Saunders,

to the said jurors unknown,) giving to him, the said William Wallace Saunders, sometimes called William Saunders, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot off out of the pistol aforesaid by the said John Andersen, alias John Anderson, with the intent aforesaid, in and upon the head of him, the said William Wallace Saunders, sometimes called William Saunders, (and in and upon other parts of the body of him, the said William Wallace Saunders, sometimes called William Saunders, to the said jurors unknown,) several grievous, dangerous and mortal wounds, and the said John Andersen, alias John Anderson, did then and there, to wit: At the time and place last above mentioned, him, the said William Wallace Saunders, sometimes called William Saunders, piratically, feloniously, wilfully and of his malice aforethought cast and throw from and out of the said vessel into the sea, and plunge, sink and drown him, the said William Wallace Saunders, sometimes called William Saunders, in the sea aforesaid, of which said mortal wounds, casting, throwing, plunging, sinking and drowning the said William Wallace Saunders, sometimes called William Saunders, in and upon the high seas aforesaid, out of the jurisdiction of any particular State of the United States of America, then and there instantly died.

"And the grand jurors aforesaid, upon their oath aforesaid, do say that by reason of the casting and throwing of the said William Wallace Saunders, sometimes called William Saunders, in the sea as aforesaid, they cannot describe the said mortal wounds with greater particularity."

The case coming on before Goff, Circuit Judge, and Hughes, District Judge, defendant "demurred to the said indictment on the ground that it does not specify the locality on the high seas where the alleged offence occurred, and for other reasons not assigned. Thereupon the United States joined in said demurrer as to the said cause so assigned and objected to the said demurrer being in anywise considered, for reasons not assigned. Whereupon, after argument, the court overruled the said demurrer for the cause assigned as aforesaid and admonished the accused that he must state any

other grounds of demurrer on which he relied, as the court could not otherwise consider them. No other grounds being alleged by the accused, the said demurrer was overruled."

Defendant was duly and formally arraigned and pleaded not guilty; and then "moved to quash the writ of *venire facias* for the petit jury to be used in the trial of this particular case, on the ground that the said writ must show that said venire were summoned for the trial of this particular case, and not the general venire for offences in general to be tried at this term of the Circuit Court of the United States for the Eastern District of Virginia." This motion was overruled and defendant excepted.

A jury was thereupon duly empanelled and sworn and the trial proceeded with, and during its progress exceptions to the admission and exclusion of evidence and the giving and refusal of instructions were preserved by defendant. At the close of the Government's case in chief, defendant's counsel moved the court to instruct the jury to bring in a verdict of "not guilty" on the ground that defendant was indicted for the murder of Saunders by drowning, whereas the evidence showed that he met his death by the discharge of a pistol. The court overruled the motion and defendant excepted. A verdict of guilty having been returned, defendant made successive motions for a new trial and in arrest of judgment, which were severally overruled, whereupon he was sentenced to be executed. This writ of error was then sued out, the cause docketed, and duly argued at the bar.

The bill of exceptions contained the following preliminary statement of uncontroverted facts:

"That the American three-masted schooner 'Olive Pecker' sailed from Boston, Massachusetts, on the 20th day of June, 1897, for Buenos Ayres, South America, with a cargo of lumber under and on deck. She had on board a captain, J. W. Whitman; a mate, William Wallace Saunders, sometimes called William Saunders; an engineer of a donkey engine, William Horsburgh; a cook, viz., the defendant, John Andersen, and four seamen, viz., Martin Barstad, a native of Norway; John Lind, a native of Sweden; Juan de Dios

Statement of the Case.

Barrial, a native of Spain, and Andrew March, a native of Newfoundland; that the said 'Olive Pecker' was an American vessel, belonging to citizens of the United States; that the said vessel proceeded from Boston on her course to her port of destination until the morning of August 6, 1897, when, on the high seas and about 100 or 150 miles off the Brazilian coast, between nine and ten o'clock on that morning, the captain, Whitman, was shot in his cabin, and shortly thereafter the mate was shot on the left-hand side of the forecastle head and his body immediately thrown into the sea. The body of the captain was also thrown into the sea. Several hours thereafter the said vessel 'Olive Pecker' was burned and the cook, engineer and four seamen took to the sea in an open boat. Twenty-eight or thirty hours thereafter they reached the Brazilian coast, where, having spent the night on shore, they separated the next morning, the accused and John Lind going in a northerly direction and the other four going in a southerly direction. That the accused and Lind, within a few days, reached Bahia, in Brazil. Both shipped, the accused on a vessel called the 'Bernadotte,' bound for Pensacola, in the United States, and Lind on a Brazilian barkentine, bound for some point in Spain. The other four men, having the Spaniard as their spokesman, he being familiar with the language of the country, and not finding an American consul, made known to the Brazilian authorities what had transpired on the 'Olive Pecker,' with the request that telegrams be sent along the coast for the arrest of the accused, John Andersen. These four men, having secured passes on a vessel to Bahia, arrived there several days after the arrest of the accused, and were placed in charge of the American consul at that port. The accused handed to the American consul a statement in his own handwriting, purporting to be an account of the voyage of the 'Olive Pecker,' and also made to the American consul a sworn statement, as did also the other five men, which said statements were duly transmitted to the Department of State at Washington, and upon the call of defendant's counsel were produced for his use at the trial, but were not produced in evidence.

"At the direction of the Government at Washington, the American consul at Bahia kept the accused and the five men in custody at Bahia until the arrival at that port some time in the month of September, 1897, of the United States man-of-war 'Lancaster,' when they were put on board of that vessel and brought into Hampton Roads, Virginia, in the Eastern District of Virginia, that being the first district into which the accused was brought after the commission of the alleged offence; and the said accused, together with the five men, was turned over by the officers of the 'Lancaster' to the United States marshal on the 7th day of November, 1897, and were duly placed in confinement in the city jail at Norfolk, Virginia."

The evidence introduced on the trial was given in full, and included the testimony of the four seamen, Barstad, Lind, Barrial and March, and the engineer Horsburgh, on behalf of the Government, and that of the defendant on his own behalf. A considerable portion is set forth in the margin.[1]

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[1] Barstad, who was at the wheel when the mate was shot, testified:

"I last saw William Saunders, the mate of the said vessel, alive on the morning of August the 6th, 1897, on the left side of the forecastle head of that vessel. It was between nine and ten o'clock of that morning. He was shot at that time and place by John Andersen, the cook of the vessel and the prisoner here. I saw him shoot him. I was at the wheel of the vessel in the wheelhouse, just aft of the after-cabin.

"I heard a report of a shot in the captain's cabin, which was connected with the wheelhouse by the after companionway. Immediately after I saw John Andersen, the accused, come running up the after companionway and through the wheelhouse, with a pistol in each hand and one in his hip pocket. He ran up to John Lind, who was standing amidships by the rigging of the middle mast. He said something to Lind, but I did not hear what it was. I heard him sing out to the mate, Saunders, who was up on the cross-tree of the foremast, at work in the rigging, and say, 'Come down, Mr. Saunders.' The mate said, 'What do you want, steward?' In a little while the mate finished the job and started down the rigging. When about midway down, and when the cook, Andersen, was standing on top of the forward house, the mate started down and said, 'What you got in your hands, cook?' 'I got guns,' he says. 'Where you get them?' says the mate. 'Down in the cabin,' he says. The mate came down and stepped on the forecastle head, not on the forecastle house. Then Andersen fired a shot. The mate reeled and faced him, and said, 'For God's sake don't shoot me, cook.' The

Counsel for Parties.

Mr. George McIntosh for plaintiff in error.

Mr. Solicitor General and *Mr. William H. White* for defendants in error.

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cook fired another shot, and the mate kept on reeling; and the cook fired another one, and a third one, when the mate fell, and he shot him once after he had fallen. Then the cook sung out to the men, who were in the forecastle, 'I am in charge of this vessel; I am next to the mate.' He sung out again, 'Won't you fellows come out?' They came out, and I saw them throw the mate's body overboard. I was at the wheel all the time. Then he marched the whole gang aft and went down in the cabin and brought the captain up and threw him overboard. He then said, 'If any man like he can put me in irons.' He had two or three pistols, one in his hands then. He had said he was in charge of the vessel and had ordered the men to throw the mate and captain overboard. I was at the wheel all the time. Then he says, 'Boys, come down and have a drink.' He went down in the captain's cabin and handed a bottle of whiskey, about two parts full. He gave each a drink and took one himself. Then he marched the whole gang up on deck, just outside the door of the wheelhouse, and said, 'You know all you men is guilty for helping me throw the bodies over the side.'

"The Spaniard told him to keep the vessel off, to clew up the gaff topsails and jibs, the outer jib, and make for port. The cook said, 'Damn; you want me to get hung.' We said, 'No, steward, we don't want you to get hung.' All the time he was armed. After a little he said to the Spaniard, 'You the only sensible man amongst the crowd; I want to speak to you.' Then he called John Lind afterwards and spoke to him. I don't know what he said. He ordered the men to do so and so. I left the wheel and went to the forecastle. The rest of the men came forward to get their clothes. He ordered us to get our best clothes, and no more; he said take no discharges, bank books, nothing. He ordered the men down in the booby hatch to get up a barrel addressed to the American consul at Buenos Ayres. Then he told me to go down in the galley to tap some paraffine oil. I said 'No.' He says, 'You go,' and handed his pistol in my face. 'All right,' I says, 'steward.' I filled three buckets and passed them up, and Andrew March took it and threw it on the deck-load. He was standing there armed all the time. Then he, the cook, ordered me to take the wheel. I went. The first fire commenced at the booby hatch; the next was forward. The boat was lowered and provisions put in it." . . . "It was twelve or one o'clock when we left the 'Olive Pecker.' No vessels were in sight which could have picked up the bodies of the mate and captain."

He then gave the particulars of the sail to the shore; the arrest; etc.

This witness further said that when Andersen called to Saunders to come down —

"The mate asked him, 'What do you want, steward?' He finished his job and hung the marlin spike around his neck and came down the rigging.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

1. The cause assigned in support of the demurrer to the indictment was that it did "not specify the locality on the

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The marlin spike had a half hitch on the point, which put the point upwards. That is the way sailors do it to keep the point from striking them as they go up and down the rigging.

"There was nothing to keep me from seeing the mate in the rigging and when he came down, and all along the vessel on her port side to where the shooting occurred. The sails were all swinging to starboard. The lumber was so piled on the deck that a man running along on it would run right on top of the forward house. John Andersen was standing on top of the forward house when he shot the mate, and the mate was standing on the forecastle deck. The forecastle deck is about three feet lower than the top of the house where the cook was standing. The body of the mate was lying, when picked up, on the forecastle head, on the left side of the vessel."

On cross-examination he said: "I mean to tell the jury that five of us were intimidated by that one man, the cook — the cook with the pistols. He intimidated us so that when he ordered us to burn the ship we obeyed. He was following us up all the time. He ordered one to go there and another to go there, and another one there. We had to follow the man at the point of the pistol or else get killed. We did what we were told to do through his pistol." . . . "When the mate came down out of the rigging, he asked the cook, 'What have you got in your hands, steward?' The steward said, 'I got guns.' The mate came down, stepped on the forecastle head, and John Andersen fired a shot. The marlin spike was not in the mate's hand, but was hanging around his neck, with the point up. I am sure of that, though I was a hundred and fifty feet away. I did not have a glass. The mate was standing with his hands at his side, with the marlin spike around his neck. He did not make any hostile demonstration towards the cook. He did not come at him to strike him. I am positive of that. I do not know the mate had threatened the cook's life."

Lind testified:

"I last saw Mate William Saunders on the 6th of August of this year; he was killed that morning by John Andersen on the forecastle head, on the left or port side thereof. I saw Andersen just before the shooting of the mate that morning, coming up from the cabin through the after companionway and through the wheelhouse; I was standing amidships; he came up with a revolver in each hand; he came right up to me and asked me where the mate was, and said, 'I have killed the captain, and now the mate goes too.' The mate was then aloft, in the rigging of the foremast. I went then down on the lee or starboard side of the vessel to the forecastle house; I went and called the watch below in the forecastle house. I said, 'You better look out because the cook is on deck with revolvers.'

high seas where the alleged offence occurred." The objection was without merit. The indictment alleged the murder to have been committed "on the high seas and within the jurisdiction of this court, and within the admiralty and mari-

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As I was calling through the window I could not see on the left of the vessel. While I was calling to the men I heard a shot on the port side, on the forecastle head. I heard three or four shots, I don't know exactly how many. I heard the steward call to the men to come out, for all of them to come up there. He was calling the men in the forecastle house. He said he wanted us to throw the body overboard. When I came up, all hands were there except the man at the wheel, Martin Barstad. The mate was lying on the forecastle head with his face downward. He had a marlin spike tied around his neck. A marlin spike is used for splicing ropes, an instrument that all sailors carry aloft when they go up to splice a rope; it is carried around the neck by a long lanyard and a half hitch on the point to keep it from sticking in his legs. We threw the body overboard. Then the cook told us to come aft and get the captain's body overboard. We went in the after cabin and found the captain sitting in his chair; sitting like this, sir, with his hands folded in his lap. He looked as if he was alive. I saw blood on the side of his head, on the left side. We were told to take him up by Andersen; he helped. He was taken up and thrown overboard. Andersen was armed all this time. Before throwing the captain's body overboard, Andersen took hold of the captain's arm and felt his pulse. When the body was thrown overboard, Andersen cursed it. The captain's body was sitting in a chair in the after cabin, near the sofa on the starboard side of the cabin. He was facing forward. I had only been in the cabin once before, when we were in Boston. On American vessels seamen do not go in the captain's cabin unless they are sent or called there. There are doors opening from the forward cabin into the after cabin and from the mate's room into these cabins.

"After the captain's body was thrown overboard, Andersen told us to go down and he would give us a drink. We went down in the cabin, in the forward cabin where the dining-room table was, and got a drink. I don't recollect whether Andersen drank with us or not. There was not much liquor in the bottle, a little over half a bottle I think, not enough to make any one drunk. I didn't see any one drunk. After taking a drink, we went up on deck and talked about making the small sails fast. The Spaniard and myself suggested that the small sails be made fast and to make for land. This was not done. Andersen said, 'No, keep her up to her course,'—she was off a little. 'Keep her up to her course,' he said; 'you want me to be hanged?' He then said to the Spaniard, 'You are about the sensiblest man; I want to speak to you.' I did not hear what he said to him. He then called me. I went to the lee side of the wheelhouse and he asked me what I thought was best to do with the vessel. I said, 'The only thing we can do now is to try to make for some land.' He said, 'No, nothing is go-

time jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, . . ." Nothing more was required to

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ing to be done but to destroy the vessel.' He did not say anything more to me after that. If he spoke to any of the rest, I didn't see or hear it. He then ordered everything to make ready for to leave the ship. The old boat sail was all tore up and I started to patch that. I was engaged about it about an hour I should think. He then gave orders to lower the boat. Me and the Spaniard lowered the boat. It was the big boat you see hanging at the stern in the picture. Me and the Spaniard did lower the boat and Andrew March went down and unhooked the tackle, and we hauled the boat up alongside the vessel and got some provisions down there. Then the cook called Andrew and he went up. After I was through with that I went up on the house again and I saw flames coming out of the after hatch. She was afire then. Then they all went down in the boat and all hands cut the boat adrift, rigged up the mast and started to sail. The cook helped us to rig up the mast and sail. He was armed all that time with pistols. I do not think any other members of the crew had pistols. I did not see any of them have pistols." . . . "There were no vessels sighted after the bodies of the captain and mate were thrown overboard which could possibly have picked up the bodies."

On cross-examination this witness gave an account of a difficulty between the cook and the captain that morning about the captain's dog. About eight o'clock the captain's dog was down by the galley door and the cook threw some water on him. The dog ran up on the deck load "hollering." The captain came up and said to the cook, "Did you throw hot water on that dog?" Andersen replied that he did not throw hot water on him; that it was cold. The captain felt the dog's back and then called the cook a liar, cursed him and struck him. Lind did not see the captain strike the cook but heard the noise in the galley. Shortly after this the cook appealed to the mate, "Won't you protect me until we get to port?" To this the mate replied, "Get to port! You will get killed anyhow," or something like that. "'Go to hell — you will get killed anyhow,' or something like that."

March testified:

"After the shooting the cook came and called us out of the forecastle. He says, 'Come out here, boys, lower the boat and put me ashore. The captain and mate is dead and I am in charge of this ship.' I got out of the bed and put on my shoes in a hurry, and the cook came back a second time and says, 'Come out here, won't you? Come out here, Manuel,' and he says, 'Yes.' We went out and went on the topgallant forecastle, and he ordered us to throw the mate overboard. The mate was lying on the forecastle head, on the left-hand side. The sails of the vessel were swinging at that time to the starboard, which left the left-hand side of the vessel clear back to the wheelhouse. The cook was armed when he ordered the

show the locality of the offence. *St. Clair* v. *United States*, 154 U. S. 134, 144. But the point is now made that the indictment was demurrable because it charged the homicide to have been caused by shooting and drowning, which are means

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mate's body to be thrown overboard, and he claimed then to be in charge of the vessel. I do not remember whether he caught hold of the mate's body and helped to throw it overboard or not. The mate had a marlin spike tied around his neck when the body was throw overboard. A marlin spike is a big awl used to stick through the rope in splicing it. When it is used by a man going up and down the rigging a half hitch is taken over the point so it won't stick in his legs or get between the rigging going down. When it is around the man's neck it is tied with a string and with a half hitch on the point. He can't use it without taking the hitch off so as to hurt anybody with it. The top of the forecastle house, where the cook was standing when he shot the mate, is about three feet higher than the forecastle deck, where the mate was standing when he was shot. To get to where Andersen was when he was shot, the mate would have had to step up those three feet on top of the forecastle house." . . . "I couldn't say whether the half hitch was around the point or not.

"After the mate's body was thrown overboard we were ordered to the cabin to take the captain up and throw him overboard. The cook was armed at that time. When the mate's body was thrown overboard Andersen swore oaths at it. When he swore oaths at the body the Spaniard asked him not to curse the body that way. We all obeyed the cook and went aft and found the captain's body in the after cabin. (Here the witness identified the diagram, showing the inside of the after cabin, and marked number two.) The captain's body was found sitting in his chair, dead, with both arms folded in his lap. He looked as if he was alive, with his head back on one side and a wound in the left part of his head, about an inch above the left ear. The captain was sitting in his chair near the sofa, on the starboard side of the vessel, the point marked on the diagram 'A.' John Andersen ordered the captain's body to be taken up and thrown overboard. Andersen was at that time armed. He assisted in throwing the body overboard. He swore at it when the body was thrown into the sea, calling it 'a mean bastard.' After the body of the captain was thrown overboard the steward ordered us to get ready the boat. He then invited us down into the cabin to get a drink of whiskey. There was about two thirds of a bottle of whiskey. He drank with us. After that was done the boat was got ready. Kerosene oil was thrown over the deck load and the ship was set on fire. Then we made for land in the sail boat. It was about two hours, I think, after the bodies were thrown overboard before we left the 'Olive Pecker.' At the time these bodies were thrown overboard there was no vessel in sight which could possibly have picked them up."

* * * * * * *

"That morning before the captain was shot and before the mate was

contended to be inconsistent in themselves and not of the same species. This ground of demurrer was not brought forward in the Circuit Court, although defendant was admonished that he must state all the grounds on which he relied. But, treating

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shot I heard a difficulty between the cook and the captain about the captain's dog. As I was going forward from taking my dishes back from my breakfast, I heard the dog holler. I was standing on the forecastle house. I saw the dog come out and run aft. The captain came out and went to the galley and asked the cook if he had been throwing water on the dog, and he said no. The captain went back and felt the dog. Then I saw the captain go in the galley, but I did not know what he did there. This was about fifteen or twenty minutes, I think, before the captain was shot. I had been at the wheel of the 'Olive Pecker' many times. While standing at the wheel, in the wheelhouse, looking forward, with the sails swinging to the right or starboard side of the vessel, you can see all the way along the left-hand side of the ship, on top the forecastle house, or a man standing on top the forecastle house. The deck load did not interfere with seeing that."

On cross-examination: "I say this man intimidated us all at the pistol's point. He ordered us to throw the mate overboard. I obeyed his orders, because I wanted my life a little longer. After the captain was thrown overboard, we all went into the cabin and took a drink. I can't say that we took a drink at the pistol's point, but he made us throw the mate's body overboard. He did not tell me he would kill me if I did not, but I knew enough to know he would do it. There were four of us altogether. I did not have a knife. I do not know whether I went ahead or who went ahead when we went into the cabin to take a drink. We had to throw the body of the captain overboard because the cook ordered us to do it. I took orders from the cook because he gave me to understand he was in charge of the ship. At the time I knew he was, because he had all the guns. It makes a big difference when he had all the arms."

Barrial testified:

"I last saw Mate Saunders alive on board that vessel on the morning of the 6th of August, 1897, when the vessel was about a hundred or a hundred and fifty miles off the Brazilian coast. On that morning I left the wheel of the vessel about 8 o'clock, being relieved by Martin Barstad, and went after my breakfast; then went to the forecastle and to my cabin. While I was lying down, after that — I do not know how long — I heard the captain's dog holler. Andrew March came in the forecastle and says, 'The captain is having a racket with the cook,' and I says, 'What can we do? Let him racket,' says I, and it was a little while before John Lind came and knocked at the window where I was sleeping. When he finished talking to me I heard the report of four shots. I went in the forecastle in a narrow place between the engine room and my bunk. I went in there because I thought the cook wanted to kill us too. The engineer jumped on my bunk and got out, too. I heard the cook sing out in the door,

it as open to consideration, we think the indictment was clearly sufficient as ruled in effect in *St. Clair's case.*

In that case, defendant was charged with the murder of Fitzgerald on board the bark Hesper on the high seas, by

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'Come out here, boys! Come out here quick!' 'Yes, sir,' says I, 'let me finish dressing.' He says, 'Come out here. I am in charge of the vessel.' I went out and the first thing I saw was the mate lying on the top of the forecastle deck on the left-hand side, with his face downwards. The cook says, 'Throw him overboard,' and then I says, 'Don't, cook; don't throw him overboard, he's alive.' He says, 'Throw him overboard; he's dead enough.' We threw him overboard, and after we threw him overboard the cook says, 'Now go aft and pick the captain up.' When he threw the body overboard he cursed at the body. Then he ordered the men aft to throw the captain overboard. All the while he was armed with pistols. We went under his orders and into the captain's cabin. When we got in the cabin we saw the captain sitting in his chair with both hands in his lap, and his head leaning slightly to one side and on his breast. I thought he was alive. I saw he had a bullet to go through near the left side of his head. His body was taken up and thrown overboard. When his body was thrown overboard, the cook cursed it also. After it was thrown over he said, 'Come on, boys, I will give you a drink.' We took a drink, and after we took a drink all came on deck and I said, 'We will make the staysails and the topsails fast and if a squall strikes her we can manage the other sails, and we go right into Rio de Janeiro or Bahia.' I sung out to Martin Barstad at the wheel, 'Keep her off,' and the cook says, 'No, I don't want to go to the land.' He was standing close to the rail. And he said, 'Do you want me to be hung? There is nothing to be done but destroy the vessel,' he said. Then he called me and said to me, 'You are the sensiblest man on board this vessel, and I want to speak to you.' 'All right, cook,' I says. He took me on top the galley and says, 'I am a murderer, and I killed these people to save my life and your lives. Now, you fellows,' he says, 'you are guilty of helping me throw the bodies overboard, and before you leave the vessel you will be as guilty as I am. You ain't got nothing to fear.' Says he, 'Many a vessel leaves port and they don't know where they go, and there's nobody to look after us for a long, long time, and we will have time to run away.' I told him I had nothing to fear with the vessel in port. I says, 'Look here, cook, destroy the vessel, it's a terrible thing, it's worse than what you have done already. Call all hands here and tell us what you want to do and where you want us to sail ashore, and we will help you as much as we can, and let us go into port.' 'No, no,' he says, 'that won't do; the vessel must be burned.' He ordered a small boat to be made ready, and everything was made ready and then he took us down into the cabin and he says, 'I didn't kill these people to rob the vessel. I grant you all fellows clothes out of this large chest,' and we went in and everybody took some clothes, and the cook says,

striking and beating him with a weapon unknown, and thereby giving him "several grievous, dangerous and mortal wounds," and then and there casting and throwing him from the vessel into the sea, and drowning him, "of which said

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'You fellows can put on your best clothes,' and he gave me a suit of clothes, and he says, 'You don't want to take anything;' so we went forward and put on our best suit of clothes, and the cook had us to pour oil on the deck. The cook called us to hurry up and spread the oil on the deck. I didn't want to do this. I went to the forecastle and the cook came and said, 'What are you doing there? Come and give your hand with this oil.' I says, 'Yes, cook; let me finish shaving and I go.' When I went on deck I could see that the oil was already. It had been spread over the deck. The cook then told us to lower a boat and it was lowered, and Andrew March unhooked the tackle and we took the boat alongside the vessel and I jumped in too. Provisions were then put in the boat and when everything was ready Andersen called to me, 'Come up and light the fire.' 'Well,' I says, 'let me keep the lookout on the boat; it might smash against the vessel.' So he called Andrew March, and the first time he called Andrew he did not come, so he called him again in wild words and March went up."

On cross-examination: "Q. After the cook here had killed the mate, didn't he tell you you might put him in irons? A. Yes, sir; he came and he says, 'Now you fellows can put me in irons and carry me to port, if you want.' Q. And give me to the American consul? A. No, sir; the same words I told you, sir. 'Now you fellows,' he says, 'can put me in irons and take me in port if you want.' I says, 'No, no, cook, I no put you in irons,' because he looked right in my face; and I says, 'Why don't you throw your revolvers away?' Q. He offered to give himself up to you, holding out his hands, and said: 'Put me in irons?' A. He didn't throw his revolvers away. Q. He didn't? A. No, he didn't. Q. Did he hold out his hands to put him in irons? A. With his revolvers, yes; and I says, 'No, no, cook, I won't put you in irons; no, no.' Q. Do you mean to say he had the revolvers in his hands when he offered you to put him in irons? A. Yes, sir."

Horsburgh was asleep in his berth in the after cabin when the captain was shot. What he supposed was the noise of the shooting of the captain awakened him, and then Andersen came to the companionway and asked him to come on deck, that he had killed the captain. He came on deck and went aft along the starboard side, where he told the crew that the cook had killed the captain. Directly after the shots, the cook came forward, shouting, "Come out, boys: I am in charge of the vessel," and ordered the mate's body to be thrown overboard. The mate was lying with his face down on the port side of the forecastle head, with a marlin spike hanging about his neck. After the mate's body was thrown overboard, the cook ordered them to go aft and throw the captain's body overboard. "We went down in the

mortal wounds, casting, throwing, plunging, sinking and drowning," Fitzgerald "then and there instantly died." The language used was much the same as that employed in *United States* v. *Holmes*, 5 Wheat. 412. The indictment was sus-

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cabin and found the captain in the chair, so we took him up on deck and threw him overboard. Then after that he told us to go down and he would give us a drink; so we went down in the cabin and had a drink." After that the cook ordered them to get the boat ready with provisions, etc. The cook was armed and witness was frightened. The burning of the vessel and the escape in the open boat as told by this witness corresponded with that of the others. On the cross-examination the difficulty between the captain and the cook about the captain's dog was reiterated.

Defendant Andersen testified in his own behalf:

"It was just after breakfast, and the dog was standing at the galley door. He used to keep himself around there all the time. The captain didn't want him to stay at the galley door, and I took some water I had left in a bucket, some dirty water, to throw it onto the dog, as I always used to throw some water on him, and he used to run and holler. I took the bucket, and there was a little water left at the bottom of it. He was standing right at the door and I had been giving him his breakfast. As the dog turned the bucket slipped in my hand. I had the handle on the edge of it, and it hit him here in the leg, and he ran up on deck and made a noise. I was looking around there for some place to run into and hide, as the captain was coming down there into the galley, and I was standing in the middle of the floor of the galley, facing the galley dresser. He struck me in the side here, and that sent me right on top the red-hot stove, on top the pots and pans. He commenced to curse me and threaten me and everything, and I pleaded to him. I says, 'Captain, don't hurt me; don't hurt me, Captain.' He looked at the axe, and he looked up through the slide. There is a little slide in the galley. He saw John Lind standing on top there, and he looked at me; he says, 'You whore's son,' he says, 'I will have the heart out of you.' And there he left me standing. I had cut them two fingers into my knuckles. The mate came along, and it was my last hopes in that vessel to see maybe another day; I had been sleeping in the galley for a week; I didn't know whether I would live to see the next day or not, so I turned to the mate, with tears rolling down my cheeks, and I said to him, 'Mr. Saunders,' I says, 'won't you protect me until we get into port?' He turned around to me with scorn. He says, 'Go to hell,' he says, 'you will get killed anyhow.' Then I did not know what I was doing. My mind was in that condition I didn't know whether to run overboard or to stay there and go and hide. I didn't know what to do. So I went up in the galley slide and looked around to see if I could see any vessel. Then I made up my mind if I should see any vessel I should take a board and jump overboard. So there I was. My basket of dishes was standing upon the dresser, all dirty, after breakfast, and I was washing them, and I saw at

tained though the particular objection under consideration was not commented on. The indictment in this case was evidently drawn from that, and charged that Andersen assaulted Saunders with a pistol with intent to kill him, by the

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the time it was twenty-five minutes to ten then. I looked around, and I didn't know if I had washed my dishes at all. Of course I was completely out of my head then, so I thought about the cabin. Now, I used to sweep that cabin every morning and dust it and everything before nine o'clock. I used to have my dishes done in the galley before this time, and I had my dinner to have ready before twelve o'clock. So I started into the cabin, thinking that the captain would be on deck, and I came down in the cabin. He was sitting inside of the door in a chair like this, although bigger, and he had a bottle on this here lounge which was alongside of the stool or the chair. He glared at me and he looked fairly black in the face with rage. He blurted out and cursed me when I came into the cabin. Well, I didn't know what to do. If I should run on deck, I would have to run overboard; that was the only way I have to see out of it. I commenced sweeping the cabin and started into the mate's room first. I saw the mate's gun lying on the shelf, and I took that down, thinking if worst come to worst, I will have to defend myself. So I finished the cabin and started into the captain's room. I passed by him in that direction [indicating by gesture], and he took up that bottle like this. He says, 'You whore's son!' Then he took it up like this as if to split my head open, when I pulled my gun out and fired. The bullet struck him in the left temple. He fell into the chair, and I ran into the captain's room. Then I thought about the mate. I ran into the captain's room then and got his two guns. He used to keep one gun in under the pillow and one on the shelf. I ran up on deck and I didn't know where the mate was then. I came up to John Lind and he was at the main rigging. I says, 'Where is the mate?' He says, 'He is aloft.' I looked up there, and I think I said something of calling him down, but I don't think I did do that. The mate came down, and before he came down to the ———, piece next to the rail, he says, 'Where in the h—ll did you get them guns?' He says, 'And where is the captain?' I never made no answer to him, but I stayed on top of that house there as the mate came down, and he had this marlin spike around his neck. I will just show you how he had it, if you please. He had this hitch on this marlin spike, as represented to you before. He came down like this and walked up like this [indicating by appropriate gestures] (walking towards the bowsprit) and turned in this direction (to the right) and came towards me in that direction (on the starboard side). He took the half hitch out of the marlin spike like this, and the marlin spike was hanging down when he came towards me. I was standing there and had the guns then. I had three of them and I held them in my hand all the time. I had an apron around my waist, and I had no pockets here in the pants. He got this hitch off the marlin spike and came around to me like this [indicating by proper gesture]

discharge of which he inflicted on him "several grievous, dangerous and mortal wounds," and that he did "cast and throw from and out of the said vessel into the sea and plunge, sink and drown him, the said William Wallace Saunders, sometimes called William Saunders, in the sea aforesaid, of which said mortal wounds, casting, throwing, plunging, sink-

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to take the marlin spike off his neck and shove the marlin spike into me. I pulled the gun and shot him. The first shot struck him here somewhere (in the side). He was still coming towards me, and I shot twice or three times together, when the man fell dead. In the meantime John Lind has been running into the lee side of the house. Now, he stated here yesterday to you gentlemen that I came up to him and says, 'Now the mate will go, too.' But that belongs on the lee side of the house; to that man. When he came there he told them, 'Now the mate will go, too.'

"Q. You mean by that that you didn't say it at all?

"A. No, sir. That belongs to John Lind and into the lee side of the forecastle; that is where that belongs. So I stood there, and John Lind — he was the man that came up first, and there was nobody else came up — so I says, 'Men,' I says, 'ain't you coming up?' I says. In the condition I felt, I felt actually frightened of the men the way I was, because I was completely gone. We throwed the mate overboard. I helped them also, so far as I can remember. And we took the captain out of the cabin and threw him overboard. And now, when this was done, I told them, I says, 'Now, men,' I says, 'you can do as you like with me,' I says; 'you can put me in irons and take into port and give me up. You see I had to defend my own life.' 'Yes,' they says, 'we all know that.' There I was, broke down completely, like a child, and here they are, coming up here yesterday to put everything onto me."

He also gave an account of the burning of the vessel and trip to the shore. On cross-examination he admitted that he was about three feet from the mate when he shot him; that he was standing on the forecastle house and the mate was down on the forecastle head; that the mate asked him not to shoot. As soon as he had killed the captain, what came into his head then was the mate; that he got the captain's pistols; that he ran up on deck through the pilot house where Barstad was and to Lind, who stood amidships, and asked where the mate was; that Lind told him the mate was aloft; that he got on top of the forecastle house, and in the excitement may have called him down. He denied having asked the men to throw the mate's body overboard, but admitted that he asked them to throw the captain's body overboard. He denied asking the crew to take a drink, but admitted that he may have got the whiskey. He denied ordering the vessel to be burned, and said that it was the engineer's suggestion. He admitted that he took the captain's watch and sold it and that the compass was thrown overboard before they reached the beach.

ing and drowning" Saunders "then and there instantly died." And it was further said, as in the indictment against St. Clair, that by reason of the casting and throwing of Saunders into the sea as aforesaid, the grand jurors "could not describe the said mortal wounds with greater particularity."

In *Commonwealth* v. *Webster*, 5 Cush. 295, the first count charged an assault and a mortal wound by stabbing with a knife; the second, by a blow on the head with a hammer; and the third, by striking, kicking, beating and throwing on the ground. The fourth count charged that the defendant feloniously, wilfully and of his malice aforethought, deprived the deceased of life "in some way and manner, and by some means, instruments and weapons to the jurors unknown." The Supreme Judicial Court of Massachusetts was unanimously of opinion that the latter was a good count. The court, speaking through Chief Justice Shaw, said: "From the necessity of the case, we think it must be so, because cases may be imagined where the death is proved, and even where remains of the deceased are discovered and identified, and yet they may afford no certain evidence of the form in which the death was occasioned; and then we think it is proper for the jury to say that it is by means to them unknown. . . . The rules of law require the grand jury to state their charge with as much certainty as the circumstances of the case will permit; and, if the circumstances will not permit a fuller and more precise statement of the mode in which the death is occasioned, this count conforms to the rules of law." In explaining the indictment and the setting out of several modes of death, the Chief Justice also said: "Take the instance of a murder at sea; a man is struck down, lies some time on the deck insensible, and in that condition is thrown overboard. The evidence proves the certainty of a homicide by the blow, or by the drowning, but leaves it uncertain by which. That would be a fit case for several counts, charging a death by a blow, and a death by drowning, and perhaps a third alleging a death by the joint result of both causes combined."

Commonwealth v. *Desmarteau*, 16 Gray, 1, was an indict-

ment for murder, containing three counts. The first charged that the murder was committed by casting, throwing and pushing the deceased into the Connecticut River, and so choking, suffocating and drowning her; the second, that the death was caused by the blows of some weapon or instrument to the jurors unknown; the third, that the death was caused by the blows and drowning both. It was held that all the counts were in proper legal form and related to a single offence, and that as a conviction on any one required the same judgment and the same sentence as a conviction on all, the jury were properly instructed that if they found the prisoner guilty of the murder as set forth in either, they might return a verdict of guilty, generally.

So an indictment which alleged that death was caused by a wounding, an exposure and a starving, was held in *Commonwealth* v. *Macloon*, 101 Mass. 1, not to be bad for duplicity, and it was ruled that it was sufficient to allege that the death resulted from all these means, and to prove that it resulted from all or any of them.

And see *Joy* v. *State*, 14 Indiana, 139; *Woodford* v. *People*, 62 N. Y. 117; *State* v. *Fox*, 1 Dutcher, (25 N. J. L.) 566, 601; *State* v. *Johnson*, 10 La. Ann. 456; *People* v. *Colt*, 3 Hill, 432; *Jones* v. *Georgia*, 65 Georgia, 621; *Rodgers* v. *State*, 50 Alabama, 102; *Gonzales* v. *State*, 5 Tex. App. 584.

In our opinion the indictment was not objectionable on the ground of duplicity or uncertainty.

Granting that death could not occur from shooting and drowning at the same identical instant, yet the charge that it ensued from both involved no repugnancy in the pleading. For the indictment charged the transaction as continuous, and that two lethal means were employed coöperatively by the accused to accomplish his murderous intent, and whether the vital spark had fled before the riddled body struck the water, or lingered until extinguished by the waves, was immaterial.

If the mate had been shot in the rigging and fallen thence into the sea, an indictment alleging death by shooting and drowning would have been sustainable.

The Government was not required to make the charge in

the alternative in separate counts. The mate was shot and his body immediately thrown overboard, and there was no doubt that, if not then dead, the sea completed what the pistol had begun.

2. The venire for the jury in this case was issued after the term began, and it is insisted that it does not appear that it was authorized by any order of court. This was a point not made below, and it appeared on the argument at bar that an order of court directing the jury to be summoned had been duly entered, but was omitted from the record because no question had been raised in that regard. A duly certified copy of that order being produced, counsel for plaintiff in error very properly waived the necessity of issuing a certiorari, on suggestion of diminution, to bring it up. This disposed of the objection as made.

On the trial plaintiff in error moved to quash the venire on the ground that it should have shown that the jurors were summoned for the trial of this particular case. The motion was overruled. The law did not require jurors necessarily to be summoned before the term began, nor the name of the particular person or persons to be tried to be inserted in the writ. This was the November term of the court, and the order was entered on the second day of December and the writ was issued on the sixth of that month, after the commencement of that term, and was in the usual form, directing the persons named to appear on a day named to serve as petit jurors at said term. So far as appears there was no irregularity in summoning and empanelling the jury, and no exception was taken to the jury as empanelled. The point was untenable.

3. One A. J. Hall testified for the Government that he built the "Olive Pecker" and had sailed her for seven years. He described the vessel, and in connection with his testimony certain diagrams and an oil painting of the vessel were introduced without objection. He testified, among other things, that with a deck load of lumber of a certain height and the vessel on the port tack a man in the wheelhouse could command a view of the port side. After he had given his testi-

mony counsel for plaintiff in error "moved to strike out all testimony as to the condition of the vessel at the time of the casualty." Counsel for the Government insisted that he had asked the witness nothing about that, and the Circuit Judge said: "The court does not understand that he has so testified. Anything that would bear that construction as a matter of course will be excluded from the jury. I think it is eminently proper that the jury should understand the character of this vessel. This man is familiar with it; he built it; he has commanded it. He is detailing to the jury nothing that took place at the time of the alleged offence. He is giving the general character and situation of the vessel, so that you may understand it, which I think is eminently proper. As he was not on the vessel at the time of this occurrence the court will not permit him to testify about anything that took place then." The ruling was correct. *Bram* v. *United States*, 168 U. S. 532, 568.

The witness was asked this question: "Is it customary in loading vessels with a deck load of lumber to leave passageways or stairways to go down in different parts of the vessel?" He answered: "We most always do that when we can, when the lumber comes right, but sometimes we have to go right over it when we can't." He was then asked, "Are you or not familiar with the deck load of the 'Olive Pecker' when she sailed from Boston on the 20th of June?" He answered: "No, I don't know anything about that."

Counsel now contends that defendant moved to strike out the testimony as to what was customary, but the record contains no such motion, and we think the reference must be to the motion above mentioned, which was properly disposed of.

4. John Lind had testified, on cross-examination, that Andersen asked the mate: "'Won't you protect me until we get to port?'" and that the mate said: "'Get to port! You will get killed anyhow,' or something like that." The question was then put: "How came he to ask the mate to protect him?" He answered: "The captain was cussing and treating him badly." Objection was made by the District Attorney on the ground that counsel had no right to go into any alterca-

tion between the accused and the captain, but counsel for the accused insisted that he might "ask what took place between the captain and Andersen that morning, whether the mate was present or not, and let the jury infer whether Andersen was alluding to that when he asked the mate for protection." The court ruled: "You may ask it. We want all the facts in the case, and if it is not relevant testimony it will be excluded." The witness thereupon gave an account of the quarrel about the captain's dog. He was then asked: "Do you know of any other circumstances? Had this captain been brutal or inhuman to this cook in any other way?" This question was objected to on the ground "that the character of the captain and his treatment of the accused prior to this time was not an issue in this case, which was a trial for the killing of the mate, and was not a part of the *res gestæ* of this case." After argument, the court sustained the objection and excluded the question, and exception was taken. Counsel for plaintiff in error immediately remarked: "I mean by the interrogatories I am going to propound now to confine myself to that morning," and continued the cross-examination. The record makes it plain that all evidence offered as to what occurred that morning was admitted, and that what was excluded in this instance was evidence of the conduct of the captain prior to the day the mate was killed. And there was nothing to indicate that that antecedent conduct of the captain was so connected with the killing of the mate as to form part of the *res gestæ*, or that it could have any legitimate tendency to justify, excuse or mitigate the crime for the commission of which Andersen was on trial.

5. After the Government had closed its case in chief, defendant's counsel moved that a verdict of not guilty be directed, because the indictment charged that the mate met his death by drowning, whereas the proof showed that his death resulted from the pistol shots. There was no error in denying this motion.

We repeat that the indictment charged the death to have resulted from shooting and drowning, and that the fact was uncontroverted that the mate was shot and immediately

thrown into the sea. There was no examination to ascertain whether he was then dead or not. He was lying face down and was picked up and thrown overboard as ordered by the accused, according to the testimony for the Government. Lind and March believed he was dead. Horsburgh said he appeared so. Barstad was doubtful, and Barrial testified he told the cook he was alive.

So far as this motion was concerned it was enough that the evidence was not conclusive that he was killed by the pistol shots.

And, as already indicated, the Government was not required to make the charge in the alternative and elect to proceed in respect of one means of death rather than the other, where the murderous action was continuous.

6. Several of the errors assigned relate to the rulings of the court limiting the testimony to the transactions on the day of the homicide. These rulings were made on certain questions propounded to the accused. His counsel asked: "Now, I want to ask this question to the witness: I want you to detail, with truth, to the jury everything that occurred in reference to this business, from the time you shipped on the 16th day of June until you left the vessel on the 6th day of August?"

This was objected to, and after argument the court, through Goff, Circuit Judge, ruled as follows: "I have no objection to your having the accused commence in his own way and detail as to him is best, confining himself to the truth, just what took place there on the morning of that day, and without any assistance from you, but I cannot permit him to detail to the jury the incidents of the voyage from the time they left Boston in June, as I understand your question to indicate." Exception was taken. Counsel then proceeded: "Q. Did you ship on the 'Olive Pecker'? A. Yes, sir. Q. Did you have trouble with the captain?"

This was objected to, and the court said: "I must say, Mr. McIntosh, that I fail to see the pertinency of testimony as to a quarrel with the captain in June or in July. Suppose the mate was a party, the charge is that of killing Saunders in

August and the testimony is confined to that time. You can show, if you can, what was the feeling between the accused and the mate, and that it was such growing out of previous quarrels or threats by the mate to take the life of the accused, or anything in that line which would tend to explain the standing of the parties at the time of this occurrence. Now, anything that bears upon what had taken place, so far as the mate is concerned, can go before this jury." Exception was taken.

Counsel continued: "Q. You shipped on board the 'Olive Pecker' some time in June, 1897? A. Yes, sir. Q. Now state to the jury all that occurred between you and the mate during that time, including all the facts and circumstances attending the 6th of August?"

All that part of the question intended to elicit what occurred between the mate and the cook from the time they left Boston was objected to.

The court said: "The trouble, Mr. McIntosh, is this, in the present condition of the testimony of this witness it is hard to see the pertinency of it now, but I do not say that it may not be pertinent. You had better first let the witness detail the transactions of the 6th of August, and if anything is developed thereby which makes it pertinent to bring in previous incidents as tending to explain what took place on the 6th, it can come in." Exception was taken.

The accused was then asked: "Detail to the court and jury all the occurrences which took place on the morning of the 6th of August, 1897." Thereupon the accused gave his account of the transactions of that date, the trip to shore and the subsequent arrest. After he had concluded his counsel put this question: "Now state what trouble, if any, you had had with this mate previous to this occasion?" The question was objected to on the ground that the testimony of the witness should be confined to what occurred on the day of the homicide. After argument, Goff, J., delivered this opinion:

"The reason I suggested to counsel for the accused that the statement as to the occurrences relating to the killing of the mate should be stated as they took place on that day was that

the testimony might be confined to a certain limit. Now, there is no doubt in the world that a party may protect his own life against the party assailing him. If he believes that he is about to suffer harm from one who has attacked; if he bases that belief upon a previous threat; if he bases that upon previous personal encounters; if he bases that upon the known brutal character of the party, the law, out of tender consideration for the frailties of human nature, will permit him to act upon that belief and upon that understanding. But can we apply that in this case? Now, we must look at the matter as it is before the jury, as it is presented by this witness. The witness states that he had a controversy with the captain; that the captain was cruel to him; then, in that hour, he turned to the mate and advised with the mate; he asked the protection of the mate. His conduct, at least, does not indicate that there was any feeling between him and the mate at that time. If the testimony is admissible, it is upon the theory that it must tend to explain the situation as it then existed. He had turned to the mate to ask his protection from the captain. Now, if the mate had attacked him, it would be perfectly competent for Andersen to show that the mate, previous to this day, had threatened him or had been cruel to him. We must look at the testimony as the witness has given it himself. It was the witness who sought the mate, and not the mate who sought the witness. I fail to see how a party can, under those circumstances, show, either by himself or by another, that he had had a controversy with the party he is about to attack, the day before or the week before, if he has had time to cool. If there had been a controversy of that kind, even under any circumstances of that kind, it does not authorize the party to take the law into his own hands. I must exclude the testimony and adhere to the intimation I gave some time ago, on another ruling, with reference to threats."

To this ruling exception was taken. Counsel then said:

"Now, in order that this matter may go down right, and in order that I may save the point, but without any disrespect to the court, I want to propound this question to the witness.

"Q. I don't want you to answer this, Andersen, until the court passes upon it. I want it to go down in the record. I want to ask you whether on the day before you had had a difficulty with the mate, and, without provocation on your part, the mate had not attempted to throw you overboard?

"Mr. McIntosh. I understand that your honor rules that I cannot ask that?

"The Court. The question is improper and cannot be answered."

And to this, exception was taken.

The preliminary rulings of the court which required the incidents of August 6 to be given at the outset are not open to criticism. The point to be considered is whether evidence of transactions previous to that day was admissible in the light of the testimony of the accused in respect of what passed on that day. It will be perceived that no specific offer of proof was made. But, assuming that counsel had offered to show by the accused that he had had trouble with the mate previously to August 6, and that the day before he had had a difficulty with him, and the mate, without provocation, had attempted to throw the accused overboard, would such testimony by the accused have been admissible in view of his own detailed account of the homicide and its surrounding circumstances? On what legal principle could it have been held to have a tendency in justification, excuse or mitigation?

Andersen's story was that on the morning of August 6 he had a difficulty with the captain about the dog; that the captain cursed him, struck him and sent him on top the red-hot stove and the pots and pans; that he subsequently appealed to the mate for protection, and he treated the application with scorn and profanity; that some time afterwards he went to the cabin to sweep it, and that the captain glared at him and cursed him. He commenced sweeping the cabin, and started into the mate's room first; saw the mate's gun lying on the shelf and took it down, thinking that if the worst came to the worst he would have to defend himself. He finished the cabin and started into the captain's room; the captain arose and was about to assault him with a bottle and he shot him.

"*Then I thought about the mate.* I ran into the captain's room then and got his two guns." He ran up on deck; asked Lind where the mate was; was told he was aloft; looked up and saw him there, and called him down or waited for him. As the mate came down he asked Andersen where he got the guns and where the captain was, but Andersen made no answer to this, and stayed on top of the forecastle house. Then as he stood on the house with the pistols, and the mate was three feet below on the forecastle head, but coming towards witness as if "to take the marlin spike off his neck and shove the marlin spike into me," witness pulled his gun and shot him. He shot him several times — the mate begging him not to shoot. Immediately after that he called up the sailors and the body was thrown overboard.

It is true that a homicide committed in actual defence of life or limb is excusable if it appear that the slayer was acting under a reasonable belief that he was in imminent danger of death or great bodily harm from the deceased, and that his act in causing death was necessary in order to avoid the death or great bodily harm which was apparently imminent. But where there is manifestly no adequate or reasonable ground for such belief, or the slayer brings on the difficulty for the purpose of killing the deceased, or violation of law on his part is the reason of his expectation of an attack, the plea of self defence cannot avail. *Wallace* v. *United States*, 162 U. S. 466; *Allen* v. *United States*, 164 U. S. 492; *Addington* v. *United States*, 165 U. S. 184.

According to his own statement, Andersen, after he had shot the captain, thought about the mate, armed himself with the captain's pistols, went in search of his victim, and finding him aloft on the mainmast at work, called him down, or, seeing him coming down, awaited him, and shot him. He was not only the aggressor but the premeditated aggressor. The captain being dead, he knew the mate would assume command, and that it would be his duty to arrest him and take him ashore for trial. The imminent danger which threatened him was the danger of the gallows. The inference is irresistible that to avert that danger he killed the mate, cast the bodies into the

sea, burned the ship and took to the open boat. There can be no pretence that he was acting under a reasonable belief that he was in imminent danger of death or great bodily harm at the hands of the mate. He testified, to be sure, that when he had armed himself, gone in search of the mate, and stood on the forecastle house ready to receive him, he thought the mate was going to use against him the marlin spike, which he had been using at his work in the rigging, and to protect himself against that marlin spike, swung around the neck of a man standing three feet below him, the accused shot him down while he was asking for his life. It was, indeed, the duty of the mate to attack Andersen as he stood there with three pistols, fresh from the slaughter of the captain, and in open mutiny. But as the accused told his story he was not repelling violence, and if the mate attempted to make use of the marlin spike, it was simply in self defence.

The case as Andersen's testimony made it afforded no basis for the introduction of evidence of prior provocation, or even of injuries previously inflicted, for no overt act on the mate's part provoked the evil intent with which Andersen sought him out on this occasion. Such evidence would not have been relevant, in view of the circumstances, as tending either to make out self defence or to reduce the grade of the crime.

We are not insensible to the suggestion that persons confined to the narrow limits of a small vessel, alone upon the sea, are placed in a situation where brutal conduct on the part of their superiors, from which there is then no possible escape, may possess special circumstances of aggravation. But that does not furnish ground for the particular sufferer from such conduct to take the law into his own hands, nor for the suspension of those general rules intended for the protection of all alike on land or sea.

7. Complaint is made because the court refused to allow a witness to testify as to the general reputation of the captain. If there had been any adequate basis for the contention that Andersen killed the mate in self defence, by reason of a reasonable belief in imminent danger from him, evidence of his character for ferocity, brutality and vindictiveness might have been

admissible. *Smith* v. *United States*, 161 U. S. 85. But, as the record stood, the character of the captain could have no legal bearing on the issue of the guilt of the accused of the murder of the mate.

8. Various instructions were asked on behalf of the defendant, as well as on behalf of the Government, which were, respectively, refused by the court, except so far as included in the instructions given. But the only ruling in this regard pressed on our attention is the alleged error of the court in instructing the jury as follows: "The other felonious homicide to which I called your attention, manslaughter, is the unlawful killing of a human being without malice, either express or implied. I find it to be my duty, gentlemen of the jury, to say to you that if the defendant has committed a felonious homicide, of which you are the only judges, there is nothing before you that reduces it below the grade of murder."

This instruction was similar to that given by Mr. Justice McKenna, then Circuit Judge, which was reviewed and approved in *Sparf* v. *United States*, 156 U. S. 51, 63. That case is decisive of this, for the evidence disclosed no ground whatever upon which the jury could properly have reached the conclusion that the defendant was only guilty of an offence included in the one charged, or of a mere attempt to commit the offence charged. The testimony of the accused did not develop the existence of any facts which operated in law to reduce the crime from murder to manslaughter.

The law, in recognition of the frailty of human nature, regards a homicide committed under the influence of sudden passion, or in hot blood produced by adequate cause, and before a reasonable time has elapsed for the blood to cool, as an offence of a less heinous character than murder. But if there be sufficient time for the passions to subside, and shaken reason to resume its sway, no such distinction can be entertained. And if the circumstances show a killing "with deliberate mind and formed design," — with comprehension of the act and determination to perform it, the elements of self defence being wanting, — the act is murder. Nor is the

presumption of malice negatived by previous provocation, having no causal connection with the murderous act, or separated from it by such an interval of time as gives reasonable opportunity for the access of fury to moderate. Kerr on Homicide, § 68, *et seq.;* 2 Bishop New Cr. L. § 673, *et seq.;* Whar. Cr. L. § 455, *et seq.;* and cases cited.

There is nothing in *Stevenson's case*, 162 U. S. 313, to the contrary. The doctrine of *Sparf's case* is there reaffirmed, that "the jury would not be justified in finding a verdict of manslaughter if there were no evidence upon which to base such a finding, and in that event the court would have the right to instruct the jury to that effect."

No other error assigned requires notice.

Judgment affirmed.

Mr. Justice McKenna dissented.